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Money for Nothing and Your (Expenses) for Free - Federal Circuit Split on Vehicle Ownership Expense in BAPCPA Means Testing

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"Money for Nothing and Your [Expenses] for Free" – Federal Circuit Split on Vehicle Ownership Expense in BAPCPA Means Testing

In re Washburn[1]

I. INTRODUCTION

In 2005 Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act[2] (BAPCPA or "the Act") in an effort to curb what it believed were excessive and abusive bankruptcy filings.[3] Congress's goals for the new legislation included creating more effective administration of the system and also "ensur[ing] that debtors repay creditors the maximum they can afford."[4] It is unsurprising that a main focus of the Act was to maximize repayment to creditors, given the millions of dollars that banks, credit card companies, and other financial institutions donated to members of Congress, and to the Republican and Democratic parties, between 2000 and 2004.[5]

Among the criticisms leveled against the Act, arguably the greatest have involved the poor quality of the Act's draftsmanship.[6] One commentator stated that the Act "is rife with bad draftsmanship, dumbfounding contradictions, and curious, even comical, special interest exceptions,"[7] while another unaffectionately termed the new Act "BARF (BAnkruptcy ReForm Act)" because of its complexity, confusing language, and "dubious policy choices."[8] The poor quality of the Act's language and construction may be due, at least in part, to the role that lawyers and lobbyists employed by various banks

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1. 579 F.3d 934 (8th Cir. 2009).

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

3. H.R. REP. NO. 109-31, pt. 1, at 1-2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 88-89.

4. *Id.* at 1-3, *as reprinted in* 2005 U.S.C.C.A.N. 88, 88-90.

5. *See* Philip Shenon, *Hard Lobbying on Debtor Bill Pays Dividend*, N.Y. TIMES, Mar. 13, 2001, at A1, *available at* http://www.nytimes.com/2001/03/13/us/hard-lobbying-on-debtor-bill-pays-dividend.html?pagewanted=1; *see also* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 318 (2007).

6. *See* Carlson, *supra* note 5, at 227.

7. *Id.*

8. Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 457 n.3 (2005).

and credit card companies played in drafting it.[9] However, Congress clearly did not thoroughly vet the Act for inconsistencies and errors before its passage, especially considering "congressional testimony to the effect that the act 'was so perfect that not a word need be changed.'"[10]

This Note addresses an issue arising out of the poor draftsmanship that characterizes BAPCPA. In *In re Washburn*, the United States Court of Appeals for the Eighth Circuit considered an issue that already has spawned a split between the federal circuits – whether in applying the "means test" a debtor may claim a vehicle ownership expense based upon a vehicle that the debtor owns free and clear.[11] The Eighth Circuit's decision allowing debtors to claim the expense follows decisions by the United States Court of Appeals for the Fifth and Seventh Circuits[12] and puts the court in conflict with the United States Court of Appeals for the Ninth Circuit.[13]

II. FACTS AND HOLDING

On March 15, 2006, Robert Earl Washburn filed for bankruptcy under Chapter 13 of the Bankruptcy Code.[14] As an individual with above-median income,[15] Washburn's Chapter 13 reorganization plan required that he pay his projected disposable income to his unsecured creditors for an applicable commitment period[16] of sixty months.[17] In determining his projected disposable income, Washburn excluded $471 per month as a vehicle ownership expense for a vehicle he owned outright and unencumbered by any debt.[18]

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9. Shenon, *supra* note 5.

10. Braucher, *supra* note 8, at 458 (quoting *In re* McNabb, 326 B.R. 785, 791 (Bankr. D. Ariz. 2005)).

11. 579 F.3d 934, 936 (8th Cir. 2009). *Compare In re* Ross-Tousey, 549 F.3d 1148, 1162 (7th Cir. 2008) (holding "that a debtor who owns his car free and clear may take the Local Standard transportation ownership deduction"), *and In re* Tate, 571 F.3d 423, 424 (5th Cir. 2009) (allowing the deduction), *with In re* Ransom, 577 F.3d 1026, 1027 (9th Cir. 2009) (denying the deduction).

12. *In re Washburn*, 579 F.3d at 935 (citing *In re Ross-Tousey*, 549 F.3d 1148 and *In re Tate*, 571 F.3d 423).

13. *See In re Ransom*, 577 F.3d at 1030.

14. Brief of Appellee at 1, *In re Washburn*, 579 F.3d 934 (No. 08-2023), 2008 WL 2964410.

15. *In re Washburn*, 579 F.3d at 936; *see* 11 U.S.C. § 1325(b)(3) (2006).

16. 11 U.S.C. § 1325(b)(1)(B) (2006).

17. *See id.* § 1325(b)(4)(A)(ii).

18. *In re Washburn*, 579 F.3d at 936. As understood by Washburn, such an exclusion was allowed when calculating current monthly income. Brief of Appellee, *supra* note 14, at 1. In 2006, the $471 exclusion was the maximum vehicle ownership allowance available for a single car. U.S. Trustee Program, IRS Local Transportation Expense Standards – Midwest Census Region (Cases Filed Between February 13, 2006, and September 30, 2006, Inclusive), http://www.justice.gov/ust/eo/bapcpa/

The United States Bankruptcy Court for the Eastern District of Arkansas approved Washburn's reorganization plan, including the $471 monthly vehicle ownership expense.[19]

One of Washburn's creditors, eCAST Settlement Corporation (eCAST), and the bankruptcy trustee, Joyce Bradley Babin (the Trustee), challenged the bankruptcy court's approval of Washburn's exclusion of the $471 as a vehicle ownership expense because the vehicle was unencumbered.[20] eCAST's motion for direct appeal was granted by the Eighth Circuit,[21] and on appeal the Trustee demonstrated that excluding the $471 from Washburn's projected disposable income would prevent Washburn from fully paying off his unsecured creditors during the sixty-month commitment period.[22] The Trustee provided further calculations, which showed that including the $471 in income would result in Washburn paying off his unsecured creditors in full.[23]

In deciding the case, the Eighth Circuit declined to follow the Ninth Circuit's recent decision on the same issue, in which the Ninth Circuit rejected such a deduction.[24] Instead, the Eighth Circuit joined the Fifth[25] and Seventh[26] Circuits, holding that a debtor with above-median income may claim a vehicle ownership expense based on a vehicle that the debtor owns outright and unencumbered.[27]

III. LEGAL BACKGROUND

The portion of the United States Code devoted to bankruptcy is divided into nine chapters.[28] Chapters 1, 3, and 5 include general provisions, guidelines for case administration, and rules for creditors, debtors, and the bank-

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20060213/bci_data/IRS_Trans_Exp_Stds_MW.htm (last visited Nov. 20, 2009). The current maximum vehicle ownership allowance for a single car is $489. U.S. Trustee Program, IRS Local Transportation Expense Standards – Midwest Census Region (Cases Filed Between November 1, 2009, and March 14, 2010, Inclusive), http://www.justice.gov/ust/eo/bapcpa/20091101/bci_data/IRS_Trans_Exp_Stds_MW.htm (last visited Nov. 20, 2009).

19. *In re Washburn*, 579 F.3d at 935.

20. *Id.*

21. *Id.* An appeal from a bankruptcy court decision typically is made either to the district court in which the bankruptcy court is located or to the bankruptcy appellate panel of the circuit in which the bankruptcy court sits, if one exists, not directly to the circuit court of appeals. *See* 28 U.S.C. § 158 (a)-(b) (2006).

22. *In re Washburn*, 579 F.3d at 936.

23. *Id.*

24. *Id.* at 937 (citing *In re* Ransom, 577 F.3d 1026 (9th Cir. 2009)).

25. *See In re* Tate, 571 F.3d 423, 424 (5th Cir. 2009).

26. *See In re* Ross-Tousey, 549 F.3d 1148, 1162 (7th Cir. 2008).

27. *In re Washburn*, 579 F.3d at 935.

28. *See generally* 11 U.S.C. §§ 101-1532 (2006).

ruptcy estate.[29] The rules in these chapters are typically applied to all other chapters, unless otherwise stated.[30] Chapters 7 through 13 are the "operative chapters" and provide the differing types of bankruptcy relief.[31] The two chapters with which this Note is concerned are the two under which consumer filings are generally made, Chapters 7 and 13.

Chapter 7 involves liquidation of the debtor's assets followed by discharge or cancellation of his remaining eligible debts, allowing the debtor "to make a fresh start."[32] Chapter 13 allows a debtor with a regular income to keep the majority of his assets but requires the debtor to make monthly payments to creditors for up to five years according to the terms of a court-approved plan.[33] At the plan's conclusion, any remaining eligible debts are discharged.[34]

For both Chapter 7 and Chapter 13, the property to be included within the bankruptcy estate is based upon 11 U.S.C. § 541(a), with limited exclusions provided by § 541(b) and § 541(c)(1).[35] Limited federal exemptions for real property, a motor vehicle, and other property interests are located in § 522(d).[36] In a Chapter 7 filing, the property in the estate, less any exclusions and exemptions, is distributed to the debtor's creditors.[37] By contrast, upon confirmation of a Chapter 13 plan, the property of the estate vests in the debtor "free and clear of any claim or interest of any creditor provided for by the plan."[38] Since, in reality, most Chapter 7 filings involve essentially no, or very few, assets,[39] it is important to contrast the relatively quick and painless discharge from bankruptcy under Chapter 7 with the protracted monthly

29. *See* ROBIN JEWELER, CONG. RESEARCH SERV., THE "BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005" IN THE 109TH CONGRESS 1 (2005), *available at* http://www.bna.com/webwatch/bankruptcycrs4.pdf. *See also* 11 U.S.C. §§ 101-562.

30. *Compare* 11 U.S.C. § 541 (general rules governing the property included in all bankruptcy estates), *with* 11 U.S.C. § 1306 (additional property included in a Chapter 13 bankruptcy estate).

31. JEWELER, *supra* note 29. *See* 11 U.S.C. §§ 701-1330.

32. MARK JICKLING, CONG. RESEARCH SERV., BANKRUPTCY REFORM: THE MEANS TEST 1 (2005), *available at* http://www.bna.com/webwatch/bankruptcycrs.pdf.

33. *See* 11 U.S.C. § 1325(b); JICKLING, *supra* note 32, at 1.

34. *See* 11 U.S.C. § 1328; JICKLING, *supra* note 32, at 1. The debts eligible for discharge upon successful completion of a Chapter 13 plan encompass a broader range than those eligible for discharge at the end of a Chapter 7 liquidation. *Id.*

35. *See* 11 U.S.C. §§ 541(a)-(b), 541(c)(1) (2006). Further statutory references are to Title 11 U.S.C. unless otherwise noted.

36. *See* 11 U.S.C. § 522(d) (2006). Some states require that bankruptcy debtors claim state exemptions, while other states allow a debtor to choose between state and federal exemptions and take the more generous of the two. *See id.* § 522(b)(2)-(3).

37. *See* 11 U.S.C. § 726 (2006).

38. 11 U.S.C. § 1327(b)-(c) (2006).

39. *See* JICKLING, *supra* note 32, at 1.

payments required by a Chapter 13 filing. This distinction is especially important because one of the most prominent inclusions in BAPCPA is the "means test,"[40] which, under certain circumstances, forces debtors out of Chapter 7 and either into Chapter 13 or out of bankruptcy completely.[41]

A. The "Means Test"

Under Chapter 13, to determine a debtor's projected disposable income, which is the amount a debtor will repay to his creditors, a court must identify and deduct from the debtor's disposable income "amounts reasonably necessary to be expended."[42] The process for determining these allowable expenses actually is not found in Chapter 13[43] but rather in Chapter 7, where the test otherwise is used to identify presumptively abusive filings.[44] This "means test" in § 707(b)(2) states that

> [t]he debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides . . . . Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts.[45]

The applicable monthly expense amounts are determined based on the Internal Revenue Service's (IRS) National Standards and Local Standards, collectively known as the Collection Financial Standards.[46] These Collection

40. *See* 11 U.S.C. § 707(b) (2006).

41. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23, 27 (2005) (codified in 11 U.S.C. § 707). A court is allowed to dismiss a Chapter 7 case or convert it into a Chapter 11 or 13 case when, on either the court's own motion or the motion of the trustee or a party in interest (a creditor), it finds that granting relief under Chapter 7 would amount to "an abuse of the provisions of [the] chapter." 11 U.S.C. § 707(b)(1) (2006). One way of identifying abuse is by way of the means test. 11 U.S.C. § 707(b)(2)(A)(i) (2006). Under the means test, a presumption of abuse arises when the calculation reveals that a debtor has sufficient disposable income to repay a significant portion of his unsecured debt. 11 U.S.C. § 707(b)(2)(A).

42. 11 U.S.C. § 1325(b)(2) (2006).

43. Section 1325(b)(3) declares that "[a]mounts reasonably necessary to be expended . . . shall be determined in accordance with subparagraphs (A) and (B) of [§] 707(b)(2)."

44. *Id.* § 707(b)(2). *See supra* notes 40-41 and accompanying text.

45. 11 U.S.C. § 707(b)(2)(A)(ii)(I).

46. *See* IRS, Collection Financial Standards, http://www.irs.gov/individuals/article/0,,id=96543,00.html (last visited Nov. 20, 2009) [hereinafter Collection Financial Standards].

Financial Standards are located in the IRS's Financial Analysis Handbook, which is itself a part of the IRS's Internal Revenue Manual (IRM).[47] The IRS uses the Collection Financial Standards "to help determine a taxpayer's ability to pay a delinquent tax liability."[48]

In the context of a delinquent tax liability, the Collection Financial Standards represent amounts that are deemed "necessary to provide for a taxpayer's (and his or her family's) health and welfare and/or production of income."[49] The National Standards include expenses for food, clothing, and other items and are the same regardless of where a debtor lives.[50] The Local Standards provide expenses for housing, transportation, and utilities but vary among regions depending on the region's cost of living.[51] Under both the National Standards and the Local Standards, expenses are based on predetermined amounts that are claimed by eligible debtors.[52] Many of a debtor's actual monthly expenses for other goods and services not covered by the National Standards and Local Standards are accounted for as Other Necessary Expenses.[53] The Other Necessary Expenses limit a debtor's deductions to actual expenses for, among others, health insurance, childcare, and accounting and legal fees.[54] While bankruptcy courts use the Collection Financial Standards in substantially the same way as the IRS – budgeting a debtor's (taxpayer's) disposable income to determine the party's ability to pay – bank-

47. IRS, INTERNAL REVENUE MANUAL §§ 5.15.1.8 to .1.10 (2009), *available at* http://www.irs.gov/irm/part5/irm_05-015-001.html#d0e855 [hereinafter INTERNAL REVENUE MANUAL].

48. Collection Financial Standards, *supra* note 46.

49. *Id.*

50. *See* IRS, National Standards: Food, Clothing and Other Items, http://www.irs.gov/businesses/small/article/0,,id=104627,00.html; INTERNAL REVENUE MANUAL, *supra* note 47, § 5.15.1.8.

51. *See* Collection Financial Standards, *supra* note 46; INTERNAL REVENUE MANUAL, *supra* note 47, § 5.15.1.9.

52. *See In re* Ross-Tousey, 549 F.3d 1148, 1151 (7th Cir. 2008) (citing 11 U.S.C. § 707(b)(2)(A)(ii)-(iv) (2006)). Whether allowances under the Local Standards can be claimed in their entirety or only in part is an unresolved issue. Some courts allow the entire allowance to be claimed based on the fact that there is no mention of using the Local Standards as a cap for actual expenses. David P. Leibowitz & Sharanya Gururajan, *Vehicle Ownership Expense Deduction: Fixed Allowance or Cap on Actual Expense?*, AM. BANKR. INST. J., July-Aug. 2008, at 12, 12. Other courts have utilized the process from the IRM, *see* Liebowitz & Gururajan, *supra*, which allows taxpayers to claim "the amount actually spent, or the standard, whichever is less." IRS, Local Standards: Transportation, http://www.irs.gov/businesses/small/article/0,,id=104623,00.html (last visited Nov. 20, 2009) [hereinafter Local Standards: Transportation].

53. 11 U.S.C. § 707(b)(2)(A)(ii)(I).

54. *Id.* § 707(b)(2)(A)(ii)(I); INTERNAL REVENUE MANUAL, *supra* note 47, § 5.15.1.10.

ruptcy courts are not explicitly required to implement these standards in accordance with IRS procedures.[55]

The vehicle ownership expense allowance, with which the court was concerned in *In re Washburn*, is one of the applicable monthly expense amounts and is located in the IRS's Local Standards.[56] The vehicle ownership expense is based on the number of cars a debtor owns and is applied uniformly across the country regardless of the region in which the debtor lives.[57] Specifically, the issue that courts have struggled to resolve is whether an "applicable monthly expense amount" is an expense that a debtor must actually incur, or whether it merely refers to "the IRS-designated expense amounts listed as Local Standards applicable in a given geographic region for a debtor's number of vehicles."[58]

B. Seventh and Fifth Circuits' Approach[59]

The issue of whether a debtor may claim a vehicle ownership expense based on a vehicle owned free and clear has generated considerable litigation in bankruptcy courts across the country.[60] Finally, in 2008 the Seventh Circuit became the first circuit court of appeals to address the issue. The Seventh Circuit case, *In re Ross-Tousey*, was based on facts substantially similar to those of *In re Washburn*.[61] In *In re Ross-Tousey*, above-median income debtors filed for bankruptcy under Chapter 7 and, in conducting their means test, claimed vehicle ownership allowances for two vehicles they owned un-

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55. *See In re Ross-Tousey*, 549 F.3d at 1159-60. *See infra* notes 85-89 and accompanying text.

56. *In re* Washburn, 579 F.3d 934, 936 (8th Cir. 2009).

57. Local Standards: Transportation, *supra* note 52. The vehicle ownership expense is actually only half of a larger transportation expense. *Id. See also In re Ross-Tousey*, 549 F.3d at 1156. The transportation expense also includes a vehicle operating cost expense. Local Standards: Transportation, *supra* note 52. *See also In re Ross-Tousey*, 549 F.3d at 1156. Similar to the vehicle ownership expense, the vehicle operating cost expense is based upon the number of cars owned by a debtor, but it also considers the region of the country in which a debtor lives. Local Standards: Transportation, *supra* note 52.

58. *In re Washburn*, 579 F.3d at 936.

59. The following discussion is focused primarily on the Seventh Circuit's decision in *In re Ross-Tousey*. 549 F.3d 1148. The Fifth Circuit case addressing this issue, *In re Tate*, adopted the reasoning and holdings of *In re Ross-Tousey* in all respects. *In re* Tate, 571 F.3d 423, 426-28 (5th Cir. 2009).

60. *See, e.g.*, *In re* Kimbro, 389 B.R. 518, 520 (B.A.P. 6th Cir. 2008); *In re* Fowler, 349 B.R. 414, 415 (Bankr. D. Del. 2006); *In re* McIvor, No. 06-42566, 2006 WL 3949172, at *2-3 (Bankr. E.D. Mich. Nov. 15, 2006); *In re* Smith, No. 06-30261, 2007 WL 1836874, at *5-6 (Bankr. N.D. Ohio June 22, 2007).

61. *Compare In re Ross-Tousey*, 549 F.3d at 1150-52, *with In re Washburn*, 579 F.3d at 936.

encumbered.[62] The bankruptcy court denied the Trustee's subsequent motion to dismiss based on the vehicle ownership expenses and allowed the debtors to claim the vehicle ownership expenses despite the vehicles being owned unencumbered.[63] The United States District Court for the Eastern District of Wisconsin reversed the bankruptcy court, "holding that the debtors could not claim the vehicle ownership deduction under [§] 707(b)(2)(A)(ii)(I) for vehicles the debtors owned outright," and the debtors appealed to the Seventh Circuit.[64]

In its opinion, the Seventh Circuit identified and considered the two approaches typically used by bankruptcy courts in resolving the issue: the "'plain language' approach," which focuses on "a perceived distinction between the terms 'applicable' and 'actual,'"[65] and the "'IRM approach,'" which borrows from the IRS's expense analysis in the Internal Revenue Manual.[66] To reach its decision, the court first analyzed the language of the statute itself, then considered the rationale behind the IRM approach, and finally looked at the policy implications of choosing one approach over the other.[67]

1. Statutory Interpretation

To analyze a statute, courts will "begin with the language of the statute."[68] When the language of the statute is clear, it is "the sole function of the court[] . . . to enforce it according to its terms."[69] However, the problem with this statute is that there is no clear consensus regarding a proper interpretation.[70] The Seventh Circuit focused on the language of the means test that states that "[t]he debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses," but the court was particularly concerned with the word "applicable" in the term "applicable monthly expense

62. *In re Ross-Tousey*, 549 F.3d at 1150-52. The fact that the debtors in *In re Ross-Tousey* filed for bankruptcy under Chapter 7 as opposed to Chapter 13 is inconsequential, as the vehicle ownership expense is a part of the means test employed by both chapters. *See supra* notes 44-57 and accompanying text.

63. *In re Ross-Tousey*, 549 F.3d at 1151.

64. *Id.* at 1152.

65. *Id.* at 1157.

66. *See id.* at 1158-60. The IRS's expense analysis limits the availability of the expense allowance to taxpayers who actually own a car encumbered by payments. INTERNAL REVENUE MANUAL, *supra* note 47, at § 5.15.1.9.1.B (2009). "If a taxpayer has a car, but no car payment, only the operating costs portion of the transportation standard is used to figure the allowable transportation expense." *Id.*

67. *In re Ross-Tousey*, 549 F.3d at 1157-62.

68. *Id.* at 1157.

69. Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004).

70. *In re Ross-Tousey*, 549 F.3d at 1157.

amounts."[71] According to the Seventh Circuit, under the plain language approach, "*applicable* monthly expense amounts" should be read as "refer[ring] to the selection of an expense amount corresponding to the appropriate geographic region and number of vehicles owned by the debtor."[72] Thus, according to courts following the Seventh Circuit's interpretation, "applicable" in "applicable monthly expense amounts" is used to identify which of the predetermined amounts in the Local Standards *applies* to the debtor's particular situation.[73]

The court in *In re Ross-Tousey* noted that the IRM approach involved a different interpretation of "applicable."[74] The Seventh Circuit found that courts following the IRM approach equated "applicable" with "relevant" and would use that interpretation to find that the monthly expense amount was only "applicable," that is, "relevant," when the debtor actually incurred such an expense.[75] "Thus, under the IRM approach, if the debtor has no debt or lease payment on his vehicle, he cannot take the ownership deduction because it is not applicable to him."[76]

After considering these two interpretations, the Seventh Circuit decided "that the plain language view of [§] 707(b)(2)(A)(ii)(I) [was] more strongly supported by the language and logic of the statute."[77] The court gave three reasons for reaching this conclusion. First, in order for all of the words in the statute to have meaning, the court noted that "*applicable* monthly expense amounts" could not be synonymous with "*actual* monthly expenses."[78] The court reasoned that the IRM approach, which would only allow the expense if the debtor had an "actual" payment, was inconsistent with the "*applicable* monthly expense amounts" language.[79]

Second, the Seventh Circuit found that the plain language approach was consistent with its interpretation of the language in § 707, which states, "Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts."[80] The court found it

71. *Id.* at 1156-58 (quoting 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006)).

72. *Id.* at 1157. Since the vehicle ownership expense is uniform across the country, it may seem unimportant to identify the appropriate region upon which to base the expense; however, the vehicle ownership expense is only one half of the transportation expense. *See* Local Standards: Transportation, *supra* note 52. The transportation expense also includes the vehicle operating expense, which is, in part, dependent upon the region in which the debtor resides. *Id. See supra* note 57 and accompanying text.

73. *See In re* Smith, No. 06-30261, 2007 WL 1836874, at *8 (Bankr. N.D. Ohio June 22, 2007).

74. *See In re Ross-Tousey*, 549 F.3d at 1157.

75. *Id.*

76. *Id.*

77. *Id.* at 1158.

78. *Id.* (emphasis added).

79. *Id.* (emphasis added).

80. *Id.* (quoting 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006)).

difficult to rationalize the IRM approach, which would only allow the expense conditioned on the debtor actually having to make a vehicle payment, when the statute specifically states that "the monthly expenses of the debtor shall not include any payments for debts."[81] The Seventh Circuit's third and final reason for preferring the plain language approach based on statutory interpretation was that in other sub-sections of § 707 Congress had been explicit in conditioning the availability of certain deductions on a showing of a debtor's actual expense.[82] The court gave examples such as "the 'debtor's reasonably necessary expenses incurred' [and] 'expenses paid by the debtor that are reasonable and necessary.'"[83] Thus, according to the court, the absence of a specific limitation suggests that the "applicable monthly expense amounts" language is not conditioned upon the showing of an actual vehicle payment.[84]

2. Rationale of the IRM Approach

The Seventh Circuit found that the IRM approach was based on the assumption that, when Congress incorporated the IRS's National Standards and Local Standards into § 707(b)(2)(A)(ii)(I), Congress also must have intended for courts to consider how the IRS, in its IRM, defined and used those amounts in determining delinquent taxpayers' allowable expenses.[85] The court, however, patently rejected this reasoning because "there [was] no indication that Congress intended [the] methodology to be used in conducting the means test."[86] In justifying this conclusion, the court identified a prior draft of BAPCPA that had contained language that would have required bankruptcy courts to use the IRM methodology when applying the means test.[87] The prior draft of BAPCPA required current monthly income to be less

> the expense allowances under the applicable National Standards, Local Standards, and Other Necessary Expenses allowance (excluding payments for debts) for the debtor . . . in the area in which the debtor resides *as determined under the Internal Revenue Service financial analysis* for expenses in effect as of the date of the order for relief.[88]

81. *Id.* (quoting 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006)).
82. *Id.*
83. *Id.* (citations omitted) (quoting 11 U.S.C. § 707(b)(2)(A)(ii)(I)-(II) (2006)).
84. *Id.*
85. *See id.* at 1158-59.
86. *Id.* at 1159.
87. *Id.*
88. *Id.* (quoting H.R. 3150, 105th Cong. § 101 (2d Sess. 1998)).

The court reasoned that, because "as determined under the Internal Revenue Service financial analysis" was eventually replaced with new language indicating that the debtor should simply "deduct the 'applicable monthly expense amounts,'" Congress had not intended to require bankruptcy courts to be constrained by the IRM provisions but intended that courts should be concerned only with referencing the numeric amounts in the National Standards and Local Standards.[89]

The court's other reason for rejecting the IRM approach was that it seemed inconsistent with Congress's intent to limit judicial discretion in the bankruptcy process.[90] Citing *In re Kimbro*, a case from the United States Bankruptcy Appellate Panel of the Sixth Circuit addressing the same issue,[91] the court agreed that Congress's inclusion of the National Standards and Local Standards was designed to make the means test a relatively simple test that could be applied uniformly and without the need for substantial judicial discretion.[92] The IRM approach, the court reasoned, was inconsistent with this congressional intent, as IRS officers are given substantial discretion in making determinations regarding a delinquent taxpayer's allowable expenses.[93]

3. Policy Implications

Finally, the Seventh Circuit considered the fairness and policy implications of choosing either the plain language approach or the IRM approach.[94] The court gave several reasons why application of the plain language approach was preferable, including the fact that there are a number of costs associated with owning a vehicle besides a lease or loan payment.[95] According to the court, the costs of "depreciation, insurance, licensing fees, and taxes" are all expenses arising out of owning a vehicle (as opposed to operating a vehicle) and would justify a debtor, even one who owns a vehicle free and clear, in claiming a vehicle ownership expense.[96] The court also noted that a debtor who owns a vehicle free and clear still bears the risk of having to re-

89. *Id.*

90. *Id.* at 1160 (citing *In re* Pearl, 394 B.R. 309, 314 (Bankr. N.D.N.Y. 2008) (finding that Congress intended to "eliminate the discretion of the courts in determining what expenses are reasonable")).

91. *See* 389 B.R. 518, 532 (B.A.P. 6th Cir. 2008) (holding that "in the bankruptcy means test, a debtor may deduct an ownership expense for a vehicle regardless of whether the debtor has a debt or lease payment on that vehicle").

92. *In re Ross-Tousey*, 549 F.3d at 1160 (citing *In re Kimbro*, 389 B.R. at 527-28).

93. *Id.*

94. *Id.* at 1160-62.

95. *Id.* at 1160-61.

96. *Id.*

place that vehicle and thus may face new lease or loan payments in the future.[97]

The court also worried that it would "produce arbitrary and unfair results" by only allowing debtors with an actual vehicle payment to claim the expense.[98] To justify this conclusion, the court compared the positions of the debtor who makes a final car payment just before filing for bankruptcy and the debtor who files a short time before a final payment is due.[99] Under the IRM approach, the first debtor would be unable to claim the expense, while the second debtor could make the claim, even though the second debtor would be without an actual payment for the overwhelming majority of the sixty-month repayment period.[100] The propensity to "'punish' debtors who choose to drive older or cheaper vehicles" – while incentivizing debtors who borrow money to purchase newer, more expensive vehicles – was another outcome that the court sought to avoid.[101]

A Fifth Circuit case, *In re Tate*,[102] is substantially similar to the Seventh Circuit's *In re Ross-Tousey* case. The Tates were Chapter 7 above-median income debtors, and in calculating their means test they claimed vehicle ownership expenses for two vehicles, neither of which were subject to any encumbrances.[103] Upon the bankruptcy trustee's motion, the bankruptcy court found that the Tates' means test had been improperly calculated based on the vehicle ownership expenses and dismissed their petition.[104] The Tates appealed to the United States District Court for the Southern District of Mississippi, where the bankruptcy court's decision was affirmed.[105] The Tates then appealed to the Fifth Circuit.[106]

The Fifth Circuit addressed only the issue of whether the vehicle ownership expense could be claimed for a vehicle that a debtor owns free and clear.[107] In its discussion of the issue, the Fifth Circuit relied heavily on the Seventh Circuit's decision in *In re Ross-Tousey*. The court reviewed the Seventh Circuit's interpretation of the statute,[108] its analysis of the reasoning underlying the IRM approach,[109] and its policy justifications for preferring the plain language approach over the IRM approach.[110] The Fifth Circuit

97. *Id.* at 1161.
98. *Id.*
99. *Id.*
100. *Id.*
101. *See id.*
102. 571 F.3d 423 (5th Cir. 2009).
103. *Id.* at 425. The Tates also claimed operating expenses for both vehicles. *Id.*
104. *Id.* at 424-25.
105. *Id.*
106. *Id.*
107. *Id.* at 426.
108. *Id.* at 426-27. *See supra* Part III.B.1.
109. *In re Tate*, 571 F.3d at 427-28. *See supra* Part III.B.2.
110. *In re Tate*, 571 F.3d at 428. *See supra* Part III.B.3.

agreed with and ultimately adopted the Seventh Circuit's position in its entirety, holding that the vehicle ownership expense is available to debtors regardless of whether the vehicle on which the allowance is claimed is encumbered.[111]

C. *Ninth Circuit's Approach*

After the Seventh and Fifth Circuits issued their opinions on the vehicle ownership expense issue, the Ninth Circuit was confronted with the same issue in *In re Ransom*.[112] Just as in *In re Ross-Tousey*, the facts from *In re Ransom* were substantially similar to those in *In re Washburn*.[113] In *In re Ransom*, the debtor claimed various monthly expense allowances in connection with his Chapter 13 bankruptcy filing, including a vehicle ownership expense allowance based on a vehicle that he owned free and clear.[114] In determining whether the debtor could claim the vehicle ownership expense, the Ninth Circuit reached the opposite conclusion of the Seventh and Fifth Circuits, holding that the debtor could not claim the vehicle ownership expense allowance.[115]

In reaching its conclusion, the Ninth Circuit began its analysis just as the Seventh Circuit had done by considering both the plain language and the IRM approaches.[116] However, rather than adopting either of the theories, the court elected to follow the reasoning of the United States Bankruptcy Appellate Panel of the Ninth Circuit (B.A.P.) and elected to decide the issue based "on the 'statutory language, plainly read.'"[117]

In its opinion, the B.A.P. had adopted the statutory interpretation that equates "applicable" from the "applicable monthly expense amounts" language with "relevant."[118] The B.A.P. reasoned that "'applicable' modifie[d] . . . "'monthly expense amounts'" and thus that the vehicle ownership expense only became "relevant" when the debtor had an actual expense.[119] The Ninth Circuit provided further support for its conclusion when it stated that "[a]n 'ownership cost' is not an 'expense' – either actual or applicable – if it does not exist, period."[120]

The Ninth Circuit also cited the section of its B.A.P.'s opinion that addressed the argument that a debtor may need to make major repairs to a ve-

111. *In re Tate*, 571 F.3d at 428.

112. 577 F.3d 1026, 1027-28 (9th Cir. 2009).

113. *Compare id.*, *with* 579 F.3d 934, 936 (8th Cir. 2009).

114. *In re Ransom*, 577 F.3d at 1027.

115. *Id.* at 1030.

116. *Id.* at 1029-31.

117. *Id.* at 1030 (quoting *In re* Ransom, 380 B.R. 799, 806 n.18 (B.A.P. 9th Cir. 2007)).

118. *Id.* at 1031.

119. *Id.*

120. *Id.* at 1030.

hicle.[121] The B.A.P. had held that there were adequate safeguards in place so that a debtor owning an older, high-mileage car would not be constrained by the more limited vehicle operating expense if faced with major repair costs.[122] The court further stated that under a showing of "'special circumstances'" additional vehicle operating expense allowances are available.[123] The court concluded by noting that its interpretation of the statute was consistent with "one of the main objectives of BAPCPA: to ensure that debtors repay as much of their debt as reasonably possible."[124]

IV. INSTANT DECISION

In *In re Washburn*, the Eighth Circuit began its opinion by describing the means test and how, despite the fact that it is actually located in Chapter 7, it is used in Chapter 13 to discern a debtor's disposable income, which is the amount to be paid back to the debtor's creditors over the applicable commitment period.[125] The court then set out the issue of whether the vehicle ownership expense, as an applicable monthly expense amount, ought to be available to a debtor who owns an unencumbered vehicle.[126] Finally, the court briefly explained the plain language and IRM approaches and how the former was based on the "perceived distinction between the terms 'applicable' and 'actual,'" while the latter "borrowed from the Internal Revenue Manual" to help define and apply the National Standards and Local Standards.[127]

Similar to the Fifth Circuit's opinion in *In re Tate*, the Eighth Circuit also largely deferred to the Seventh Circuit's decision in *In re Ross-Tousey*. The Eighth Circuit recounted the Seventh Circuit's statutory interpretation analysis and relied on essentially the same three points: (1) the idea that "'applicable' and 'actual'" should not be deemed synonymous when in such "close proximity,"[128] (2) the fact that it is difficult to rationalize the IRM's outcome of only allowing the expense when there is an actual debt because of

121. *Id.* at 1030-31.

122. *See id.* (citing *In re Ransom*, 380 B.R. at 808). Under the Local Standards, the current ownership expense is $489 for one car and is $978 for two cars, while the operating expense, which varies depending on place of residence, for one car is between $183 and $280 and for two cars is between $366 and $560. Local Standards: Transportation, *supra* note 52.

123. *In re Ransom*, 577 F.3d at 1031 (quoting *In re* Carlin, 348 B.R. 795, 798 (Bankr. D. Or. 2006) and citing 11 U.S.C. § 707(b)(2)(B)). The court further noted that an additional $200 per month is available to debtors who own high-mileage cars free and clear. *Id.*

124. *Id.* (quoting *In re Ransom*, 380 B.R. at 808).

125. 579 F.3d 934, 936 (8th Cir. 2009).

126. *Id.*

127. *Id.* at 936-37.

128. *Id.* at 937 (citing *In re* Ross-Tousey, 549 F.3d 1148, 1157-58 (7th Cir. 2008)); *see supra* notes 71-73 and accompanying text.

contradictory language in the statute,[129] and (3) the argument that Congress was much clearer in other sections of the statute by explicitly conditioning the availability of an allowance on an actual expense.[130]

The court next considered more carefully the rationale behind the IRM approach. Just as the Seventh Circuit had done, the court in *In re Washburn* viewed the failed passage of an earlier draft of the statute, which would have required bankruptcy courts to take the IRM provisions into account, as indicative of Congress's desire to avoid binding courts to those restrictions.[131] The Eighth Circuit also found that allowing courts to utilize the IRM provisions, which provide for significant discretion, was inconsistent with Congress's intent to establish a formula that could be easily and uniformly applied while limiting judicial influence.[132]

The Eighth Circuit next identified an argument that the Seventh Circuit failed to consider: a disclaimer on the IRS's website that purports to disavow any intent to have the IRM apply to any calculations besides those for tax collection.[133] It states,

> Disclaimer: IRS Collection Financial Standards are intended for use in calculating repayment of delinquent taxes. These Standards are effective on March 1, 200[9] for purposes of federal tax administration only. Expense information for use in bankruptcy calculations can be found on the web-site for the U.S. Trustee Program.[134]

The Eighth Circuit continued to follow the criteria established in *In re Ross-Tousey* and next considered the policy implications of the plain language and IRM approaches.[135] Just as the Seventh Circuit had done before it, the court in *In re Washburn* acceded to the idea that a number of policy considerations favored the plain language approach.[136] The court similarly acknowledged that a debtor may need to replace a vehicle during the repayment period,[137] that there are costs associated with owning a vehicle besides a loan

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129. *In re Washburn*, 579 F.3d at 937 (citing *In re Ross-Tousey*, 549 F.3d at 1158). *See supra* notes 78-79 and accompanying text.

130. *In re Washburn*, 579 F.3d at 938 (citing *In re Ross-Tousey*, 549 F.3d at 1158). *See supra* notes 82-84 and accompanying text.

131. *See In re Washburn*, 579 F.3d at 938 (citing *In re Ross-Tousey*, 549 F.3d at 1159). *See supra* notes 87-89 and accompanying text.

132. *See In re Washburn*, 579 F.3d at 939 (citing *In re Ross-Tousey*, 549 F.3d at 1160).

133. *Id.* at 938-39 (citing Collection Financial Standards, *supra* note 46).

134. *Id.* (quoting Collection Financial Standards, *supra* note 46). *See also In re* Kimbro, 389 B.R. 518, 527 (B.A.P. 6th Cir. 2008).

135. *Id.* at 939-40 (citing *In re Ross-Tousey*, 549 F.3d at 1161).

136. *See id.*; *supra* Part III.B.3.

137. *In re Washburn*, 579 F.3d at 939 (citing *In re Ross-Tousey*, 549 F.3d at 1161). *See supra* note 97 and accompanying text.

or lease payment,[138] and that allowing the expense only to debtors who have an actual car payment would essentially punish other debtors who had elected to either purchase "more modest vehicles" or pay off a vehicle before filing for bankruptcy.[139]

One argument that was not as relevant in *In re Ross-Tousey*, because it was a proceeding under Chapter 7 as opposed to Chapter 13, involved satisfying Congress's intent to have debtors pay back a greater amount of their debts to their unsecured creditors in Chapter 13 proceedings.[140] In *In re Ross-Tousey*, the Seventh Circuit noted that the argument was not as compelling in a Chapter 7 proceeding, because, in that context, the means test is used only to determine whether a bankruptcy petition is presumptively abusive, and achieving Congress's goal is not wholly dependent upon an initial finding of presumptive abuse.[141]

By contrast, in Chapter 13 the means test is affected only by the allowances and expenses given to a debtor; there is no secondary means of influencing the determination of disposable income.[142] Though the Eighth Circuit agreed with the Seventh Circuit that "the argument based on BAPCPA's intent to make more funds available to creditors is more compelling [in a Chapter 13] case," the Eighth Circuit did not find the argument persuasive.[143] Rather, the court was convinced by the "Seventh and Fifth Circuits' balancing of competing legislative intentions" and concluded that it would be "[in]appropriate to give § 707(b)(2)(A)(ii)(I) one meaning when applied in a Chapter Seven proceeding and another when applied in a Chapter Thirteen proceeding."[144]

In his dissent, Judge Magnuson agreed with the Ninth Circuit's opinion on the issue.[145] Judge Magnuson thought that the expense was "fictitious" and that "[a]n 'ownership cost' is not an 'expense' – either actual or applicable – if it does not exist."[146] He also believed that allowing the vehicle ownership expense based on a vehicle owned unencumbered defeated Congress's

138. *In re Washburn*, 579 F.3d at 939 (citing *In re Ross-Tousey*, 549 F.3d at 1161). *See supra* notes 95-96 and accompanying text.

139. *In re Washburn*, 579 F.3d at 939 (citing *In re Ross-Tousey*, 549 F.3d at 1161). *See supra* note 101 and accompanying text.

140. *In re Washburn*, 579 F.3d at 940.

141. *In re Ross-Tousey*, 549 F.3d at 1161-62. When a petition is not deemed presumptively abusive, that same finding of abuse still can be achieved by the secondary means of a court "find[ing] a Chapter Seven petition abusive for reasons of 'bad faith or based on the totality of the circumstances.'" *Id.* at 1162.

142. *See* 11 U.S.C. § 1325(b)(2)-(3) (2006).

143. *In re Washburn*, 579 F.3d at 940.

144. *Id.*

145. *Id.* at 943 (Magnuson, J., dissenting).

146. *Id.* (citing *In re* Ransom, 577 F.3d 1026, 1030 (9th Cir. 2009)).

intent to have debtors repay the maximum possible amount of money to their creditors.[147]

Aside from the argument that the means test should not allow a debtor to claim an ownership expense based on a vehicle owned free and clear, the other position taken by eCAST on appeal was that the court should "depart from the disposable income 'starting point' and disregard [the vehicle ownership] expense when determining projected disposable income."[148] In making this argument, eCAST pointed to the Eighth Circuit's decision in *In re Frederickson* (which was decided after the parties had submitted briefs for the instant case), where the court decided that "disposable income" was merely the "starting point for determining the debtor's 'projected disposable income'" and that a "final calculation can take into consideration changes that have occurred in the debtor's financial circumstances *as well as the debtor's actual income and expenses*."[149] The court, however, declined to directly address this argument and gave several reasons justifying its refusal.[150]

First, the court based its rejection of the "projected disposable income" argument on the fact that neither eCAST nor the Trustee had made the argument to the bankruptcy court.[151] The court of appeals reasoned that, despite the fact that *In re Frederickson* was decided after the parties had submitted briefs for the case, the argument needed to have been made to the bankruptcy court if relief based upon the argument was to be sought on appeal.[152] Second, the court was not inclined to conduct "the fact-intensive analysis required" by *In re Frederickson*.[153] Finally, the court was unsure "that attempted prediction of future vehicle-ownership expense could serve as a sufficiently certain basis for departing from the disposable income definition," especially when the record was "[in]sufficient to enable anything more than a speculative assessment of whether projected disposable income should, on the present facts, differ from disposable income."[154]

V. COMMENT

The current split over the vehicle ownership expense issue extends well beyond the four courts of appeals discussed. Numerous bankruptcy courts, bankruptcy appellate panels, and district courts have addressed the issue as

147. *Id.*

148. *Id.* at 941 (majority opinion).

149. *Id.* (emphasis added) (quoting *In re* Frederickson, 545 F.3d 652, 659 (8th Cir. 2008)).

150. *Id.* at 941-42.

151. *Id.*

152. *Id.*

153. *Id.* at 942.

154. *Id.*

well, and yet no definitive consensus has emerged.[155] Given the divergence among courts on this issue, it seems likely that the question of claiming a vehicle ownership expense based on a vehicle owned free and clear will remain unresolved until either the issue makes its way before the Supreme Court of the United States or Congress amends the language in § 707(b)(2)(A)(ii)(I).

One of the most interesting aspects of the Eighth Circuit's decision in *In re Washburn* is its refusal to consider eCAST's argument based on the emerging distinction between disposable income and projected disposable income.[156] The Eighth Circuit's relatively recent decision in *In re Frederickson* specifically addressed the question of how "'projected disposable income,'" as used in § 1325(b)(1)(B), was to be interpreted in relation to "'disposable income,'" as defined in § 1325(b)(2).[157] The court, in *In re Frederickson*, concluded that a determination of a debtor's "projected disposable income" requires a "forward-looking" approach in order to allow for changes in the debtor's financial situation as well as consideration of the debtor's "actual income and expenses," thus ultimately providing a result "more closely align[ed] with reality."[158]

While the implications of the *In re Frederickson* decision have not been completely defined, the possibility seems to exist that the inclusion of actual income and expenses in the determination of a debtor's projected disposable income has the potential to largely resolve the problems surrounding vehicle ownership allowances based on vehicles owned free and clear. If projected disposable income includes a debtor's actual income and expenses, and it can be proven with reasonable certainty that the vehicle ownership expense would not be used for monthly loan or lease payments,[159] then the additional money allotted to the debtor under the vehicle ownership expense allowance could

155. *Compare id.* at 935, *In re* Ross-Tousey, 549 F.3d 1148, 1162 (7th Cir. 2008), *In re* Tate, 571 F.3d 423, 424 (5th Cir. 2009), *In re* Kimbro, 389 B.R. 518, 532 (B.A.P. 6th Cir. 2008), *In re* Armstrong, 395 B.R. 127, 132 (E.D. Wash. 2008), *In re* Ragle, 395 B.R. 387, 400 (E.D. Ky. 2008), *In re* Chamberlain, 369 B.R. 519, 526 (Bankr. D. Ariz. 2007), *and In re* Weiderhold, 381 B.R. 626, 627 (Bankr. M.D. Pa. 2008), *with In re* Ransom, 577 F.3d 1026, 1027 (9th Cir. 2009), Grossman v. Sawdy (*In re* Sawdy), 384 B.R. 199, 205 (E.D. Wis. 2008), *In re* Deadmond, No. 06-60512-7, 2008 WL 191165, at *4 (D. Mont. Jan. 22, 2008), *In re* Slusher, 359 B.R. 290, 310 (Bankr. D. Nev. 2007), *In re* Harris, 353 B.R. 304, 308 (Bankr. E.D. Okla. 2006), *and In re* Oliver, 350 B.R. 294, 301 (Bankr. W.D. Tex. 2006).

156. *See In re Washburn*, 579 F.3d at 940-41 (discussing *In re* Fredrickson, 545 F.3d 652, 659 (8th Cir. 2008)).

157. *See In re Fredrickson*, 545 F.3d at 658.

158. *See id.* at 658-59.

159. *See In re* Lasowski, 575 F.3d 815, 819 (8th Cir. 2009) (adopting the standard that changes in the debtor's financial circumstances must be "reasonably certain to occur").

potentially be re-included in the debtor's projected disposable income, thereby increasing the amount of the debtor's monthly payments to creditors.

Because Congress passed BAPCPA primarily at the prompting of banks and other members of the credit industry,[160] it is at least plausible that, should Congress opt to reassess and redraft § 707 of the Act, it would do so in a manner beneficial to the credit industry. In an effort to anticipate how a revised version of the section might read, there are four considerations that must be kept in mind. The first two considerations are goals Congress might seek to achieve through a change in the Act's language, while the latter two are intentions Congress might finally satisfy. First, Congress could limit the availability of the vehicle ownership expense allowance to only those debtors who have loan, lease, or similar monthly payments encumbering their vehicle. Second, Congress could ensure that debtors continue to receive the full allowance even when their payments are less than their respective expense. While the desirability of this possibility is admittedly more debatable than the first, Congress's decision to exclude any mention of the IRM, or the Local Standards as a "cap," from the final version of the Act suggests a desire to avoid limiting the allowances under the National Standards and Local Standards to a debtor's actual expenses – a desire to which a change in the Act's language can continue to adhere.

The other two considerations that must be acknowledged are Congress's dual intentions of having an easily applied, straightforward system that limits judicial discretion and having a system that prompts debtors to pay as much as possible back to their creditors.[161] Under the current language of the Act, these two intentions are diametrically opposed. Despite the Ninth Circuit's decision to adopt its B.A.P.'s holding that "the 'statutory language[] plainly read'" prevents debtors from claiming the expense,[162] the analyses of the Fifth, Seventh, and Eighth Circuits under the plain language approach provide a more compelling argument that the statutory language on its own would allow the expense regardless of actual monthly loan or lease payments. Such an outcome certainly supports Congress's desire to limit judicial discretion but comes at the expense of fostering maximum repayment from debtors to their creditors. The IRM approach is similarly incapable of reconciling these apparently contradictory intentions. While the IRM approach allows courts to reject the vehicle ownership expense, and thereby increase the amount that creditors will collect, it does so only because judges exercise a significant amount of their discretion by incorporating the IRM and its limitations into their analyses.

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160. *See* Carlson, *supra* note 5, at 318.

161. *See* H.R. REP. NO. 109-31, pt. 1, at 1-5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 88-82.

162. *In re* Ransom, 577 F.3d 1026, 1030-31 (9th Cir. 2009) (quoting *In re* Ransom, 380 B.R. 799, 806 n.18 (B.A.P. 9th Cir. 2007)).

While the current version of the statute is undoubtedly incapable of satisfying Congress's different intentions, revised language easily could result in a mechanical and straightforward test that prevents debtors lacking monthly loan or lease payments from claiming the expense allowance. Congress should amend § 707(b)(2)(A)(ii)(I) to read as follows:

> The debtor's monthly expenses for *existing obligations* shall be the *appropriate* monthly expense amounts *as indicated* under the National Standards and Local Standards and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides . . . .

Such a change would satisfy all four of the concerns mentioned above. The new language would restrict the availability of the vehicle ownership expense to only debtors who have an existing obligation while avoiding limiting the expense to allow only for actual expenses – the full "*appropriate* monthly expense amount" still could be claimed. The change also would preserve the limitation on judicial discretion by creating an easily applied test for allowing the expense only when the debtor has existing obligations. The limitation to existing obligations also prevents debtors who lack a vehicle payment from taking the expense, thus ensuring that debtors repay more of their debts to their creditors.

VI. CONCLUSION

The Eighth Circuit's decision in *In re Washburn* has the potential to have very real ramifications for parties required to undergo the means test as part of their filing for bankruptcy relief under Chapter 7 or 13. Because the ownership allowance under the Local Standards is $489 for a single car and $978 for two cars,[163] the ability to claim the allowance based upon owning a vehicle or vehicles free and clear often will be enough to tip the means test outcome in favor of the debtor, regardless of whether the filing is in Chapter 7 or 13. This typically would mean that debtors proceeding in Chapter 7 would be able to remain there and avoid being forced into Chapter 13, and debtors already proceeding in Chapter 13 would be able to keep an extra $489 or $978 each month rather than paying that amount to their creditors. Whether this outcome is a fortuitous benefit or an unwarranted detriment depends on a party's position as either debtor or creditor. Ultimately, it is an issue that likely will continue to produce substantial litigation until resolved by either a Supreme Court decision or a congressional amendment to BAPCPA's language.

163. Local Standards: Transportation, *supra* note 52.

This Note proposes an amendment to the Bankruptcy Code that will resolve this difficult issue of statutory interpretation. The proposal balances the interests of debtors and creditors and frees up bankruptcy courts to decide other issues left unresolved under BAPCPA.

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