No. 08-15066

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re JASON RANSOM,
Debtor.

JASON RANSOM,
Debtor-Appellee

— v. —

MBNA, AMERICA BANK, N.A.
Creditor-Appellant

ON APPEAL FROM THE BANKRUPTCY APPEALLATE PANEL
FOR THE NINTH CIRCUIT – NO.07-1254

BRIEF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR-APPELLEE AND SEEKING REVERSAL OF THE BANKRUPTCY APPELLATE PANEL DECISION

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March 3, 2008

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Ransom v. MBNA, America Bank, N.A., No. 08-15066.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock.
NONE.

3) If there is a publicy held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.
NONE.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

Dated: March 3, 2008

Tara Twomey, Esq.
Attorney for the National Association of Consumer Bankruptcy Attorneys

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 400,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Kagenveama,* No. 06-17083 (9th Cir.); *In re Rodriguez*, 375 B.R. 535 (B.A.P. 9th Cir. 2007).

NACBA and its membership have a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom own motor vehicles. The proper application of section 707(b)(2)(A)(ii)(I) in both chapter 7 and chapter 13 has been widely debated by creditors, debtors, counsel and commentators. This case affords the court an opportunity to address this debate and provide the first guidance on the issue from a Court of Appeals.

SUMMARY OF ARGUMENT

The plain language of the statute dictates that above-median income debtors be permitted to deduct the car ownership expense under sections 1325(b)(3) and 707(b)(2)(A)(ii)(I) when calculating disposable income, even if a debtor does not make a monthly car payment. Section 1325(b)(3) directs such debtors to use the expenses detailed in section 707(b)(2)(A) and (B) in calculating disposable income. Section 707(b)(2)(A)(ii)(I) clearly provides that the debtor's monthly expenses "shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards…issued by the Internal Revenue Service..." Thus, for the purposes of determining disposable income, debtors are permitted to claim the Local Standards ownership expenses based on the number of vehicles the debtor owns, rather than on the number for which the debtor makes payments. Such as result is not only reasonable, but also one that is consistent with Congress's intent to create a uniform and fair test for determining debtor's disposable income that will be made available to unsecured creditors in chapter 13.

ARGUMENT

I. The plain language of the statute dictates that above-median, chapter 13 debtors must determine reasonably necessary expenses in accordance with section 707(b)(2)(A)(ii)(I), which in turn permits debtors to deduct the car ownership expense even if debtors do not make a monthly car payment.

A. By stating in section 707(b)(2)(A)(ii)(I) that the debtor "shall" use as his or her expenses the "amounts specified under the National Standards and Local Standards," Congress created a fixed allowance for debtors in the amounts specified.

The starting point for the court's inquiry should be the statutory language of 11 U.S.C. §§ 1325(b)(2), 1325(b)(3) and 707(b)(2)(A)(ii)(I). *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004); *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself."). It has been well established that 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." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted). A result will only be deemed absurd only if it is unthinkable, bizarre or demonstrably at odds with the intentions of its drafters. *See In re Spradlin*, 231 B.R. 254, 260 (Bankr. E.D. Mich. 1999), citing *Public Citizen v. Dept of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d. 377 (1989). A plain reading of the statutory language in this case results not only in a reasonable outcome, but also one that is

consistent with Congress's intent to create a uniform and fair method for determining debtor's disposable income available to unsecured creditors. *See* 11 U.S.C. § 1325(b)(2).

The language of sections 1325(b)(2), 1325(b)(3) and 707(b)(2)(A)(ii)(I) is clear. Section 1325(b)(2) provides that disposable income is based upon "current monthly income" less specified adjustments and less reasonably necessary expenses. *See In re Frederickson*, 375 B.R. 829 (B.A.P. 8th Cir. 2007). For debtors whose income exceeds the applicable median family income, section 1325(b)(3) states that reasonably necessary expenses shall be determined in accordance with section 707(b)(2)(A) and (B). *See In re Austin*, 372 B.R. 668 (Bankr. D. Vt. 2007). Section 707(b)(2)(A)(ii)(I) provides that the debtor's monthly expenses "shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards…issued by the Internal Revenue Service..."

Transportation allowances fall under the Local Standards and are divided into two components: operating costs and ownership costs. The Internal Revenue Service ("IRS") sets out the specific amounts allowable to the debtor in each subcategory. [1]

[1] The Local Transportation Expense Standards may be found at http://www.irs.gov/businesses/small/article/0,,id=104623,00.html (Rev. Oct. 1, 2007).

Because section 707(b)(2)(A)(ii)(I) "provides that the debtor's allowed expenses 'shall be' the 'amounts specified' under the Local Standards—and because the statute makes no provision for reducing the specified amounts to the debtor's actual expenses—a plain reading of the statute would allow a deduction of the amounts listed in the Local Standards even where the debtor's actual expenses are less." Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 Am. Bankr. L.J. 231, 257-58 (2005). *See also* 6 *Collier on Bankruptcy* ¶ 707.05(2)(c)(i)(A. Resnick and H. Sommer, eds., 15th ed. Rev. 2007)("The better view is that, because the language refers to deducting the 'amount specified' in the standards, and not actual expenses, the ownership allowance specified in the standards is the minimum amount to be deducted"). The IRS authorizes it agents to use flexibility in applying the National and Local Standards.[2] However, the statutory language of section 707(b)(2)(A)(ii)(I) allows no discretion. *See In re Phillips*, 2008 WL 352396 (Bankr. D. Mass. Feb. 7, 2008). Accordingly, a majority of courts have found the amounts specified in both the National Standard and Local Standards, including transportation expenses, serve as fixed allowances. *See In re Fowler*,

[2] For example, the Local Standard for transportation expenses permit a taxpayer to claim more than the standard allowance if the expenses are substantiated as necessary living expenses. See Local Transportation Expense Standards, http://www.irs.gov/businesses/small/article/0,,id=104623,00.html (" If the amount claimed is more than the total allowed by the transportation standards, the taxpayer must provide documentation to substantiate those expenses are necessary living expenses.")

349 B.R. 414 (Bankr. D Del. 2006); *see also In re Musselman*, 379 B.R. 583, 590-91 (Bankr. E.D.N.C. 2007). **Indeed, all five courts to publish opinions on this issue in 2008 have disagreed with the conclusion reached by the *Ransom* court.** *See In re Clark*, 2008 WL 444565 (Bankr. E.D. Wis. Feb. 14, 2008); *In re Sawicki*, 2008 WL 410229 (Bankr. D. Ariz. Feb. 12, 2008); *In re Weiderhold*, 2008 WL 353109 (Bankr. M.D. Pa. Feb. 11, 2008); *In re Phillips*, 2008 WL 352396 (Bankr. D. Mass. Feb. 7, 2008); *In re Simms*, 2008 WL 217174 (Bankr. N.D.W. Va. Jan. 23, 2008). Under section 707(b)(2)(A)(ii)(I), a creditor may not force debtors to claim a smaller allowance if the debtors' actual expenses are lower, nor may debtors claim a larger expense even if their actual expenses are higher, necessary and substantiated. *Cf.* Local Transporation Expense Standards, *available at* http://www.irs.gov/businesses/small/article/0,,id=104623,00.html (permitting debtors higher expenses if necessary and substantiated).

Under the revised disposable income test, Congress has determined what expenses are reasonably necessary, thereby relieving courts from the duty to answer the difficult questions of lifestyle and philosophy that were prevalent under the old law. *See In re Austin*, 372 B.R. 668 (Bankr. D. Vt. 2007)("BAPCPA has removed the bankruptcy courts' discretion to consider the reasonableness of the expenses set forth in Schedule J in above-median cases"); *In re Farrar-Johnson*, 353 B.R. 224, 231 (Bankr. N.D. Ill. 2006)("Eliminating flexibility was the point:

obligations of chapter 13 debtors would be subject to 'clear, defined standards,' no longer left 'to the whim of a judicial proceeding.'"); *see generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 485 (2005). Importing the means test expenses scheme into the chapter 13 disposable income test ensures that debtors' ***total*** expenses are reasonable. It avoids the need for courts to independently evaluate the reasonableness of each expense covered by the standards. Consequently, a debtor could spend more in one category, e.g., food, and less on another, e.g., housing. To limit any individual category, such as food, or car expenses, to the actual amount of the debtors' expenses defeats the purposes of the means test: to create an objective, not subjective, measure of ability to pay and to remove judicial discretion in determining reasonable and necessary expenses.

B. In specifying reasonable expenses for above-median income debtors, Congress did not adopt the methodology used by the Internal Revenue Service in evaluating a taxpayer's ability to pay, rather it created a different, objective and inflexible measure of the debtor's ability to pay for purposes of the Bankruptcy Code.

In revising the disposable income test for chapter 13 debtors and developing the means test for chapter 7 debtors, Congress went to great length to create an objective test, which it felt was a fair and appropriate method by which to determine a debtor's ability pay. The highly detailed and complex formulas used in these tests reflect Congress' attempt to balance two main objectives of the

Bankruptcy Code: a fresh start for the debtor and the fair and orderly repayment of creditors. By contrast, providing the taxpayer a fresh start or allowing repayment of creditors, other than the IRS, is not a stated goal or objective of the IRS collection process. *See* Financial Analysis Handbook, Internal Revenue Manual § 5.15.1.1, ¶¶ 1-3 (hereinafter "IRM")(describing purpose of financial analysis and listing alternative case resolutions); *see also In re Clark,* 2008 WL 444565, at *6; *In re Moorman*, 376 B.R. 694, 697 (Bankr. C.D. Ill. 2007). "No basis exists for the court to allow the National or Local Standards to be spliced based on what an IRS field agent would do when dealing with a delinquent taxpayer." *In re Simms*, 2008 WL 217174, at *18.

In weighing the interests the debtor, secured creditors, unsecured creditors, and other parties in interest, Congress has reasonably determined, and clearly stated, that the amounts specified in the categories covered by the Local Standards including the ownership component of transportation expenses, are fixed allowances. Conversely, the Internal Revenue Manual ("IRM") plainly provides that the amount specified for all the local standards (including housing, utilities and

transportation expenses) serve as a cap.[3] *See In re Simms*, 2008 WL 217174, at *17. Notably Congress did not use language similar to the IRM, which it could easily have done if it intended the Local Standards to apply as a cap. *See In re Moorman*, 376 B.R. at 697-98; *In re Fowler*, 349 B.R. at 418. In fact, Congress rejected the IRS methodology that was specifically referenced in an earlier version of the bill. *See In re Fowler*, 349 B.R. at 419 ("The change from the prior version evidences Congress' intent that the Courts not be bound by the financial analysis contained in the IRM and lends credence to the Court's conclusion that it should look only to the amounts set forth in the Local Standards."); *see also* H.R. 3150, § 101(4) (105th Congress 1998)(permitting debtor to deduct "expense allowances… as determined under the Internal Revenue Service financial analysis").

The BAP, however, fails to address the point that Congress did not refer to the IRS's financial analysis in the final bill. *In re Sawicki*, 2008 WL 410229 (Bankr. D. Ariz. Feb. 12, 2008). The *Ransom* court concedes that some other courts have adopted wholesale the language of the IRM, but the court disavows adherence to that position. *In re Ransom*, 380 B.R. 799, 806 (B.A.P. 9th Cir. 2007)(finding that the IRM does not give meaning to the statute). After eschewing

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[3] "The taxpayer is allowed the local standard or the amount actually paid, **whichever is less**."[3] *See* IRM § 5.19.1.4.3.2 (emphasis in original). *See also* IRM § 5.15.1.1. available at http://www.irs.gov/irm/index.html. Notwithstanding this cap, taxpayers may be able to take a higher expense than provided for in the standard if the expense is necessary and substantiated. *See* Local Standards, available at http://www.irs.gov/businesses/small/article/0,,id=104623,00.html.

reliance on the legislative history or IRM, the court instead turns to its "holistic" interpretation of the Bankruptcy Code and the purported plain meaning of the word "applicable" as used in the statute. *Id.* at 807.

C. The phrase "applicable monthly expense amounts" relates to the actual number of vehicles owned by the debtor, regardless of whether the underlying vehicles are paid in full.

Section 707(b) permits a debtor to claim "applicable" monthly expense amounts. With respect to the car ownership expense, the term "applicable" simply relates to a determination of the number of vehicles owned by the debtor and which column to use in finding the appropriate figure in the Local Standards table (First Car or Second Car). In this way, the term "applicable" does not differ whether used in reference to monthly expense amounts, § 707(b)(2)(A)(ii)(I), or to State median income, *see, e.g.*, § 707(b)(6). Nothing in the statute suggests that the term "applicable" is limited only to encumbered vehicles.

Some courts, however, have erroneously construed the word "applicable" to mean "actual" in order to narrow the scope of the ownership allowance to actual expenses incurred by the debtor. *See In re McGuire*, 342 B.R. 294 (Bankr. W.D. Mo. 2006); *see also In re Rezentes*, 368 B.R. 55 (Bankr. D. Hawaii 2007). Indeed, the *Ransom* court appears to adopt such an approach. *In re Ransom*, 380 B.R. 799, 807 (B.A.P. 9th Cir. 2007)("what is important is the payments that the debtors actually make, not how many cars they own, because the payments that debtors

make are what actually affect their ability to make payments to their creditors").[4] Such a construction is flawed because it requires interpretation of the word "applicable" in isolation and without regard to the word "actual," which is used in the same sentence. 11 U.S.C. § 707(b)(2)(A)(ii)(I). Congress drew a distinction in the statute between "applicable" expenses on the one hand and "actual" expenses on the other. *In re Farrar-Johnson*, 353 B.R. 224, 225 (Bankr. N.D. Ill. 2006)(holding debtor entitled to housing allowance under Local Standards in excess of actual housing costs). "Other Necessary Expenses" must be the debtor's actual expenses. *Id.* In contrast, expenses under the Local Standards need only be "applicable" based on where the debtor lives and the number of vehicles owned. *See id.*

Other courts have held that the terms "actual" and "applicable" are contextually different, but not mutually exclusive. *See, e.g.*, *Fokkena v. Hartwick*, 373 B.R. 645, 650 (D. Minn. 2007); *Neary v. Ross-Tousey*, 368 B.R. 762, 765 (E.D. Wis. 2007). These courts have adopted the "split-the-baby" approach in which the ownership allowance is not a cap as provided in the IRM, but debtors must have some lease or loan payment (even just $1) in order to claim the deduction. *See Ross-Tousey*, 368 B.R. at 765. As a result, debtors driving a

[4] Despite this statement the court notes that the issue of whether the debtor is allowed the full expense if his lease or loan payment is less that the amount specified in the Local Standards was not before the court. *In re Ransom*, 380 B.R. at 808 n.20.

"Mercedes or Mercury" are entitled to the same ownership allowance but only so long as they have some debt payment. *Id.* These decisions fall short because they fail to consider the possible existence of any ownership expense other than a financing obligation in place on the date of filing.[5] Further, the artificial construct created by these courts is supported by neither the plain language of the statute (allowing deduction of the specified amount) nor the Internal Revenue Manual (allowing only actual expenses).

This court, like the majority of courts considering the issue to date, should hold that the word "applicable" when viewed in relation to the rest of the sentence means the applicable ***number*** of vehicles owned by the debtor, without reference to liens encumbering each vehicle. A debtor owning unencumbered vehicles should be permitted to deduct ownership expenses for each vehicle in completing Form B22C.

[5] Notably, under the IRM the operating expense includes costs for "normal maintenance" not major repairs. *See* IRM § 5.19.1.4.3.4. If the debtor is not permitted an ownership expense and the operating expense only includes "normal maintenance" then there are no funds available to perform major repairs (e.g., brake or transmission repair).

CONCLUSION

For the foregoing reasons, the decision of the Bankruptcy Appellate Panel should be reversed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2008 an original and 15 copies of the foregoing Brief of *Amicus Curiae* in Support of Appellant and Reversal were sent to the Clerk for the Ninth Circuit Court of Appeals via Federal Express and two copies mailed to counsel listed below:

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