SOUTHEASTERN BANKRUPTCY LAW INSTITUTE

36th Annual Seminar on Bankruptcy Law and Rules

March 18 – 20, 2010
Atlanta, Georgia

Disposable Income and Related Issues
March 18, 2010

Honorable Frank J. Santoro
United States Bankruptcy Judge
Eastern District of Virginia, Norfolk and Newport News Divisions[1]

1 These materials were prepared with the editorial and research assistance of Kelly M. Barnhart, in connection with another recent seminar presented with the author, and her assistance to this project is greatly appreciated.

I. Projected Disposable Income

If either the chapter 13 trustee or an unsecured creditor objects to confirmation of a proposed chapter 13 plan, the plan may not be approved, unless the chapter 13 plan provides that "all of the debtor's projected disposable income received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."[2] The phrase "projected disposable income" is not new, although not defined anywhere in the Title 11 of the United States Code (the "Bankruptcy Code").

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 ("BAPCPA"), projected disposable income was determined from the debtor's income and expenses set forth on Schedules I and J, forms required to be filed by every individual debtor. If the trustee or a creditor objected, the court determined the amount allowed as "reasonable" expenses to be used in the projected disposable income calculation.[3] BAPCPA did not alter this requirement. However, it added a definition of disposable income in 11 U.S.C. §1325(b)(2). Disposable income is defined as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended" for the debtor to provide for himself and any dependents.[4] Current monthly income, in turn:

> (A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on--
>
> (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
>
> (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and
>
> (B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.[5]

[2] 11 U.S.C. §1325(b)(1).

[3] 11 U.S.C. §1325(b)(2).

[4] 11 U.S.C. §1325(b)(2).

[5] 11 U.S.C. §101(9) (2006).

A. Calculating Projected Disposable Income

The existence of the definition of disposable income and the lack of a definition for projected disposable income has resulted in a split among the courts on what actually constitutes "projected disposable income." Since the enactment of BAPCPA the courts have developed three interpretations of what is meant by "projected disposable income": (1) the "mechanical approach", which relies solely upon the debtor's Form B22C to calculate how much the debtor should be paying each month under the plan; [6] (2) the "forward-looking approach," adopted by the majority of bankruptcy and circuit courts, which provides that when calculating projected disposable income, the starting point may be Form 22C, however if there is a showing of a change of circumstances, then Schedules I and J may be considered, since these are forward looking projections, rather than based on historical numbers, like Form 22C[7]; and (3) the

---

[6] *See, e.g., Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008); *In re Kolb*, 366 B.R. 802 (Bankr .S.D. Ohio 2007); *In re Bardo*, 379 B.R. 524 (Bankr. M.D. Pa. 2007); *In re Quigley*, 391 B.R. 294 (Bankr. N.D. W. Va. 2007); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006); *In re Barr*, 341 B.R. 181 (Bankr. M.D. N.C. 2006) (holding that an above median debtor's disposable income is calculated according to sections 1325(b)(2) and 1325(b)(3), not based on figures listed in debtor's Schedules I and J); *In re Buck*, 2007 Bankr. LEXIS 4272 (Bankr. E.D. Va. 2007) (holding that projected disposable income is calculated by referencing Form 22C); *In re Winokur*, 364 B.R. 204 (Bankr. E.D. Va. 2007). In *Winokur*, the Court explained, "[t]here are two approaches to setting plan payments: case-by-case determinations and standardized determinations. The Chandler Act of 1938 and the Bankruptcy Reform Act of 1978 both opted for individualized treatment of each chapter 13 case. In each bankruptcy case, the chapter 13 trustee examined the facts and circumstances of the debtor's financial affairs to determine on an individual basis what the debtor could afford to pay to his or her creditors. Creditors also had the opportunity to examine the debtor, the plan, and the schedules and to object to confirmation. Based on the chapter 13 trustee's recommendations, creditor objections (if any), the debtor's schedules, and any evidence taken at the confirmation hearing, the court determined if the debtor was devoting his or her actual projected net disposable income to the chapter 13 plan. The other approach is a formula applicable to all debtors. The debtor, the trustee and the court only need the input, mainly the debtor's income. The formula mechanically determines the result, the amount of the plan payment.

Neither approach is perfect. One consequence of the individualized approach is the seeming lack of uniformity and the consequent suspicion-sometimes well justified-that some debtors are taking advantage of the bankruptcy system by not paying everything that they could. One consequence of the formula approach is that it prevents some debtors who want to pay their creditors from succeeding because the computed payment is too much for their particular circumstances. Another consequence is the windfall some debtors receive when the mathematical formula results in a chapter 13 plan payment that is less than the amount that they can afford to pay. Congress was undoubtedly aware of the tradeoffs between the two approaches. In 1938 and 1978, it chose the first; in 2005, the second. The statutory language is clear. The court has no discretion to substitute its judgment for that of Congress." *Winokur*, 364 B.R. at 304-05. Query: if projected disposable income is to be determined using Form 22C and not Schedules I and J, why are those forms still being used, and what are they used for?

[7] *See, e.g., In re Edmunds*, 350 B.R. 636 (Bankr. D. S.C. 2006) (holding that projected disposable income is a forward-looking concept that is not limited to a debtor's pre-petition income average under Form B22C but relates to debtor's actual income expected over the life of the chapter 13 plan); *In re Turner*, 2009 U.S. App. LEXIS 15492 (7th Cir. July 20, 2009); *Nowlin v. Peake (In re Nowlin)*, 2009 U.S. App. LEXIS 15860 (5th Cir. July 17, 2009); *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008), *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2008); *Hildrebrand v. Petro (In re Petro)*, 395 B.R. 369 (6th Cir. BAP 2008); *Kibbe v. Sumski (In re Kibbe)*, 361 B.R. 302 (1st Cir. BAP 2007)(*per curiam*); *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006); In re Watson, 366 B.R. 523 (Bankr. D. Md. 2007).

"harmonizing approach", evidenced in *In re Johnson*[8], where the current monthly income is used "not to compute an average monthly pre-petition income figure, but only to give effect to the inclusions and exclusions from monthly income from section *101(10A)(A)* and *(B)*.[9]

Those in support of the mechanical approach believe that projected disposable income is a mathematical formula whereby the disposable income calculated on Form 22C is multiplied by the number of months of the applicable commitment period. An example of this line of reasoning is *In re Miller*[10], out of the Northern District of Alabama. The court in *Miller* reasoned:

> Section 1325(b)(3) clearly states that the amounts reasonably necessary to be expended for purposes of determining disposable income 'shall' be determined under §707(b)(2)(A) and (B). The disposable income calculations made on Form B22C are drawn, not from the debtor's Schedule J, but from the Internal Revenue Service standards and additional deductions allowed under §707(b)(2). Those courts that argue Congress intended something more when it referred to 'projected disposable income' in §1325(b)(1)(B) fail to address the fact that Congress defined 'disposable income' in §1325(b)(2). Section 1325(b)(1)(B) first makes reference to 'disposable income,' and then § 1325(b)(2) goes on to explain what is being 'projected'.[11]

Those in favor of the mechanical approach reason that the "plain meaning of the word 'projected' in and of itself, does not provide a basis for including other data in the calculation" of disposable income."[12] For these courts, the word projected simply means that the debtor's disposable income should be multiplied over the applicable commitment period.[13] One of the statutory arguments in support of this position is §1325(b). Specifically, §1325(b)(3) provides that the amounts reasonably necessary to be expended under paragraph (2), the definition of disposable income, shall be determined in accordance with 11 U.S.C. §707(b)(2)(A) and (B), if a debtor is considered to have an above-median income, which requires a court to rely upon the calculation of current monthly income provided by Form 22C to calculate disposable income.[14] Those in favor of the mechanical approach also reason that if disposable income and projected

---

Lanning is currently under consideration by the United States Supreme Court but has not been decided as of the date of the preparation of these materials.

[8] 400 B.R. 639, 649 (Bankr. N.D. Ill. E.D. 2009).

[9] *In re Odom*, 2009 Bankr. LEXIS 1746, * 9 (Bankr. D. Col. 2009).

[10] 361 B.R. 224 (Bankr. N.D. Ala. 2007).

[11] *Id*. at 234-35.

[12] *Kagenveama*, 541 F.3d at 873.

[13] *Id*. at 872.

[14] *See, e.g., In re Berger*, 376 B.R. 42, 47-48 (Bankr. M.D. Ga. 2007); *In re Farrar-Johnson*, 353 B.R. 224, 228 (Bankr. N.D. Ill. 2006); *In re Guzman*, 345 B.R. 640, 643-44 (Bankr. E.D. Wis. 2006). It should be noted however, that §1325(b)(3) deals with expenses, not income of a debtor.

disposable income are not somehow linked, then disposable income is just a meaningless definition.[15] Often those courts that adopt the mechanical approach reason that the majority approach results in §1325(b)(2) being rendered superfluous because that subsection defines disposable income and the only other reference to disposable income is the term "projected disposable income" so if it does not apply to this phrase, it has no purpose.[16]

On the opposite side of the debate are those courts which believe that "projected" demands that courts consider more than the figures laid out in Form 22C.[17] A well-known decision first discussing this is *In re Hardacre*.[18] In *Hardacre*, the Bankruptcy Court for the Northern District of Texas concluded that the word "projected" modified disposable income, and thus could not be the same as the term "disposable income." The court concluded that projected disposable income means "income that the debtor reasonably expects to receive during the term of her plan."[19] Another court has reasoned that if a debtor's current monthly income as calculated by Form 22C does not reflect a debtor's actual current income, then the court should use the latter and ignore the artificial figure.[20]

A number of courts have adopted a blended approach, concluding that projected disposable income must be based on a forward looking examination of debtor's income in order to give meaning to the word "projected."[21] For example, the Bankruptcy Court for the Middle District of Florida has held that "projected disposable income has a broader meaning than disposable income" since "'projected' is a forward-looking term, whereas disposable income relies only on historical income data."[22] These courts hold that there is presumption that projected disposable

---

[15] *Alexander*, 344 B.R. at 749; *In re Tranmer*, 355 B.R. 234, 242 (Bankr. D. Mont. 2006).

[16] *Kolb*, 366 B.R. at 816.

[17] *See, e.g., In re Purdy*, 373 B.R. 142, 146 (Bankr. N.D. Fla. 2007) The Court reasoned, "'Section 1325(b)(2) defines 'disposable income' but § 1325(b)(1)(B) requires that a debtor propose a plan paying '*projected disposable income*.' Meaning must be given to the word 'projected,' as it obviously has independent significance.'" *Id*. at 146 (quoting In re *Jass,* 340 B.R. B.R. 411, 415 (Bankr. D. Utah 2006)) (emphasis in original). The Court continued, "[p]rojected" means planned, figured, or estimated for the future. Therefore, most courts consider it to be a forward-looking term, as opposed to the historically-oriented calculation used for "disposable income." *Id*. (citations omitted).

[18] 338 B.R. 718.

[19] *Id*. at 723.

[20] *Kibbe*, 361 B.R. at 312.

[21] *See, e.g., Nowlin*, 2009 U.S. App. LEXIS 15860; *Frederickson*, 545 F.3d 652; *Lanning*, 545 F.3d 369; *Hildebrand v. Petro (In re Petro)*, 395 B.R. 369 (6th Cir. BAP 2008); *In re Kelly,* 2009 Bankr. LEXIS 860 (Bankr. E.D. Va. March 2, 2009) (holding that the disposable income figure may be adjusted after being calculated by the means test in certain extreme circumstances); *Kibbe* , 361 B.R. 302; *In re Hardacre*, 338 B.R. 718; *In re Watson,* 366 B.R. 523; *In re Grady*, 343 B.R. 747 (Bankr. N.D. Ga. 2006); In re Meek, 370 B.R. 294 (Bankr. D. Idaho 2007); *In re Slusher*, 359 B.R. 290, 296 (Bankr. D. Nev. 2007); *In re Jass*, 340 B.R. 411.

[22] *In re LaPlana*, 2007 Bankr. LEXIS 329, at *16-*17 (Bankr. M.D. Fla. Feb. 9, 2007). *See also*, *In re Arsenault*, 370 B.R. 845, 850-51 (Bankr. M.D. Fla. 2007) (holding that projected disposable income is calculated on a forward looking basis, not simply using the figures used in Form 22C and therefore bonuses to be received during life of plan

income is the same as disposable income, as established by Form 22C, which may be rebutted (presumably by a preponderance of the evidence) by showing a change in circumstances. One of the earliest decisions adopting this approach is *In re Jass*.[23] In *Jass*, the bankruptcy court explained that Form 22C is a starting point in determining whether the debtor was proposing all of his projected disposable income as required under section 1325(b)(2).[24]

Since the enactment of BAPCPA, five circuit courts have considered how projected disposable income should be calculated, and only one, the Ninth Circuit, has adopted the mechanical approach. The other circuits have held that while Form 22C may be a starting point, change in circumstance should be considered when determining whether a debtor has pledged all of her projected disposable income as funding for her chapter 13 plan.

Those courts that have adopted the forward-looking approach believe that the fallacy of the minority viewpoint is that it fails to give meaning to all of the words in §1325(b)(1)(B), specifically, the following words and phrases, "as of the effective date of the plan," "projected," and, significantly, "to be received."[25]

First, reason the parties and courts adopting the forward-looking approach, the date by which the income amount is judged is "as of the effective date of the plan." This phrase "indicates that the court should determine, at that time, whether the plan meets the remaining requirements of subparagraph (b)(1)(B)."[26] While not defined, it is widely accepted that the term "effective date" is the date of plan confirmation, since the plan is not binding on anyone until it is actually confirmed.[27] Typically, the effective date is considered to be some time after the petition date, which for those using Form 22C to calculate income, is the start date. Given that there may be changes in circumstances, reasoned the Seventh Circuit recently, courts should consider a debtor's financial circumstances at the time the plan is confirmed, rather than as of the petition date.[28]

Second, as often pointed out by the majority of courts dealing with this issue, the word "projected" is normally considered forward looking. While not defined in the statute, "projected" means "[t]o calculate, estimate, or predict (something in the future), based on present

---

must come in as funding for the plan since a debtor is to commit all of his projected disposable income as funding for the plan).

[23] 340 B.R. 411 (Bankr. D. Utah 2006).

[24] *Id*. at 417.

[25] *Hardacre*, 338 B.R. at 723; *Petro*, 395 B.R. at 377.

[26] *Lanning*, 545 F.3d at 1279.

[27] *Id*. (citing *In re Pak*, 357 B.R. 549 (Bankr. N.D. Cal. 2006), abrogated on other grounds by Kagenveama, 541 F.3d 868).

[28] *Turner*, 2009 U.S. App. LEXIS 15942.

data or trends."[29] These courts place a great deal of emphasis on the word "projected." These courts have adopted the forward looking approach, reasoning that Congress intended "projected disposable income" to refer to future income and that, therefore, a backward-looking Form 22C calculation cannot be dispositive as to the amount a debtor should pay under a plan, because, simply stated, it is an historical number, not a projection into the future.[30] These courts reason that if disposable income, as defined by §1325(b)(2) was used in place of projected disposable income, the future-orientation of the word "projected" would not be given any meaning.[31]

Finally, the majority view points out, the statute refers to income "to be received during the applicable commitment period." The weakness of the minority position, the majority courts often point out, is that it fails to address situations where the historical income figures may not relate to the actual income the debtor is to receive during the applicable commitment period of the plan. In order to give this phrase meaning, "the inquiry should be focused on the reality of a debtor's prepetition average income."[32] The phrase "to be received during the applicable commitment period," appears to suggest that Congress intended to refer to income actually to be received by the debtor rather than what the debtor received during the six months prior to the filing for bankruptcy relief.[33] If this phrase was ignored, it would be rendered meaningless.

As is evident by the case law, one thing is clear: the addition of the definition of "disposable income" has resulted in a large amount of litigation. So much so, it is fair to say that the debate over what is projected disposable income may well be the most litigated issue in consumer cases today. "'Arguably no change in BAPCPA has generated as fundamental a difference in the bankruptcy courts' reported opinions as how to determine projected disposable income for above median income debtors in chapter 13.'"[34]

While each side of the debate contends that the statute's plain language supports its position, all approaches have their difficulties. The mechanical approach does not allow adjustment to projected disposable income regardless of the reality of a debtor's finances, nor does it take into consideration the actual language of the statutory phrases used in §1325(b), and the forward looking approach makes the definition of "disposable income" superfluous, unless of course, a presumption that disposable income is simply a starting point, which may be rebutted by a showing of a change in circumstances, is read into it. The answer to the debate may be solved by considering the basic principles behind BAPCPA, as stated by the Seventh Circuit:

> Since the object of a Chapter 13 bankruptcy is to balance the need of the debtor to cover his living expenses against the interest of the unsecured creditors in recovering as much

---

[29] *Id*. at 415 (quoting the Am. Heritage College Dictionary 1115 (4th ed. 2002)).

[30] *In re Davis*, 392 B.R. 132, 138 (Bankr. E.D. Pa. 2008).

[31] *In re Slusher,* 359 B.R. at 296.

[32] *Petro*, 395 B.R. at 377.

[33] *Hardacre*, 338 B.R. at 723; *Nowlin*, 2009 U.S. App. LEXIS 15860, at *10-11.

[34] *In re Roberts*, 2008 Bankr. LEXIS 2600, at *17-18 (quoting Hon. Thomas F. Waldron and Neil M. Herman, Principled Principles of Statutory Interpretation: A Judicial Perspective after Two years of BAPCPA, 81 Amer. Bankr. L.J. 195-96 (Summer 2007).

> of what the debtor owes them as possible, we cannot see the merit in throwing out undisputed information, bearing on how much the debtor can afford to pay, that comes to light between the submission and approval of a plan of reorganization. Sometimes …the creditors will benefit from the new information. But in other cases it will be debtor… .[35]

This seems to be more in-line with the idea of a fresh start for those persons suffering from financial problems and avoids requiring certain debtors to pay more than they can actually afford or allowing certain debtors to pay less than they can afford. It also alleviates the problems with cases involving debtors who may not qualify for chapter 7 protection because their means tests reflect a disposable income, but who no longer make the same amount of income and thus cannot propose and confirm a plan since they are bound to pledge the same amount of income that they historically earned during the six months prior to the filing. While Congress may have intended that these debtors file chapter 11 bankruptcies, they will be faced with the identical problem, given that 11 U.S.C. §1129(a)(15)(B) requires debtors to pledge all of their disposable income.

Unless Congress intended to shut out bankruptcy as an option for many people, it would seem that the forward-looking approach is the more reasonable approach, in that it does not prevent bankruptcy protection for those individuals who lack the income to pledge during the applicable commitment period the exact amount listed on Form 22C, nor does it allow debtors to pledge less than they actually make at the time of confirmation simply because Form 22C says that their disposable income is a lesser amount.

B. Expenses

Because projected disposable income is based upon net income rather than gross, a basis for objection to confirmation relates to debtors' expenses.[36] The issue is whether to use the expenses disclosed on Form 22C in calculating a debtor's net income or whether to use the expense figures disclosed on Schedule J. The Bankruptcy Court for the Middle District of Alabama explained its reasoning in considering Schedule J expenses, "[t]he statute looks to the future, --to the time of confirmation and thereafter—to determine the debtor's disposable income. It speaks of projected disposable income (§1325(b)(1)(B)) and of amounts to be expended (§1325(b)(2)). A court must consider the future finances of the debtor—not just the historical."[37]

Courts are split about whether to use the expense figures disclosed on Schedule J in determining the debtor's projected disposable income, or those expenses listed on Form 22C. In *In re Guzman*, the bankruptcy court concluded that there is no discretion in determining which expenses to consider for above-median income debtors.[38] Rather, the court held that expenses

---

[35] *Turner*, 2009 U.S. App. LEXIS 15942, at *17 (citations omitted).

[36] *In re Casey*, 356 B.R. 529, 521 (Bankr. E.D. Wash. 2006).

[37] *In re Thicklin*, 355 B.R. 856, 859 (Bankr. M.D. Ala. 2006).

[38] 345 B.R. 640. *See also, Arsenault*, 370 B.R. at 852.

are limited to those listed in Form 22C.[39] In *Miller*, the bankruptcy court agreed, concluding that, with respect to above-median income debtors:

> BAPCPA clearly limit[s] the court's role in reviewing the expenses of above median income debtors . . . . By tying the phrase "amounts reasonably necessary to be expended" to the IRS standards, BAPCPA limit[s] the judicial discretion exercised prior to the amendments in determining whether the expenses of an above-median-income debtor are reasonably necessary and replaced judicial discretion with the means-test calculations under §707(b)(2).[40]

Similarly, in *In re Lynch*[41] and *In re Faison*[42], the Bankruptcy Courts for the Eastern District of Virginia, Richmond Division, have held that debtors' expenses are limited to those as provided for in Form 22C, even if debtors are no longer making the expense payments. As the court in *Lynch* explained, there are a number of factors which support this position, including the statutory language, congressional intent, the language of Form 22C, the desire for a bright line rule by Congress, and for uniformity/consistency.[43] Many of the cases that adopt this position have adopted Judge Goldgar's reasoning in *In re Burmeister*.[44] In this case, the court concluded that the phrase "scheduled as contractually due" are to be determined as of the petition date regardless of whether the case was a chapter 7 or 13 case, and should be deducted no matter whether the debtor intended to surrender the collateral postpetition. These cases stress that there should be no distinction between drawn depending on what chapter bankruptcy has been filed.

Other courts have drawn a distinction on whether debtors may deduct for expenses related to collateral they are surrendering collateral depending on what chapter they are filing. These courts often refer to the date of the confirmation of the plan, as well as emphasize that the plan, upon confirmation, is a new contract, and therefore if the plan provides for surrender, the obligations are no longer contractually due.[45]

Even if the debtors are permitted to claim the deductions for expenses they will no longer be paying, since they are surrendering the collateral, this may not end the discussion, since upon confirmation of the plan, there will be a change of circumstances which may call for a modification of the plan for a change in circumstances. Query whether the trustee or unsecured creditor needs to wait for the plan to be confirmed, or whether the plan may be objected to,

[39] *Guzman*, 345 B.R. at 643.

[40] 361 B.R. at 228.

[41] 368 B.R. 487 (Bankr. E.D. Va. 2007).

[42] 2008 Bankr. LEXIS 3997 (Bankr. E.D. Va. 2008).

[43] *Lynch*, 368 B.R. at 491-92.

[44] 378 B.R. 227 (Bankr. N.D. Ill. 2007).

[45] *See, e.g.*, *In re Vernon*, 385 B.R. 342 (Bankr. M.D. Fla. 2008); *In re Van Bodegom Smith*, 383 B.R. 441 (Bankr. E.D. Wis. 2008); *In re White*, 409 B.R. 330 (Bankr. Md. 2009).

arguing that the plan is not filed in good faith since, upon surrender, a modification of the plan will need to be filed in order to increase plan payments, or to address the removal of this expense. Also, query whether the change in circumstances needs to be substantial and unanticipated.

C. Basis for Objection

Courts are also split as to whether the amount being proposed to repay a debtor's creditors may be considered in determining whether the debtor's plan is proposed in good faith. Some courts maintain the position that BAPCPA retains the 1984 Act's removal of ability to pay or amount of payment from the consideration of a debtor's good faith.[46] For example, the court in *In re Farrar-Johnson*, noted that disposable income is simple arithmetic and that a debtor's good faith in claiming them cannot be relevant.[47] Some courts have concluded that BAPCPA has limited courts' discretion in reviewing a plan's reasonableness based on the totality of the circumstances.[48]

For example, in the recent Seventh Circuit case, *Turner*, the Court of Appeals noted that it disagreed with the allegation that the debtor's plan was proposed in bad faith simply because he made a claim regarding how to calculate projected disposable income, which was rejected by the Court.[49] It held that "[i]t is not bad faith to seek to advance one's economic interests by making a claim based on a defensible view of one's legal rights, even if the view ends up being rejected… ."[50]

Other courts have held that the amount of proposed payments to unsecured creditors may still be considered in determining a debtor's good faith.[51] In *Grady*, the Bankruptcy Court for the Northern District of Georgia, noted that a debtor's payment into her plan of projected disposable income could be considered in determining whether the debtor was acting in good faith.[52] In *In re Anstett*[53], the Bankruptcy Court for the District of South Carolina reasoned that it had the authority independently to review plan confirmation and, in doing so, considered the good faith of the debtor.[54] *Anstett* noted that the standard in the Fourth Circuit is "whether the plan

---

[46] *See, e.g., In re Barr*, 341 B.R. 18; *Alexander*, 344 B.R. at 752.

[47] *In re Farrar-Johnson*, 353 B.R. at 232.

[48] *In re Rotunda*, 349 B.R. 324 (Bankr. N.D.N.Y. 2006).

[49] *Turner*, 2009 U.S. App. LEXIS 15942, at *19-20.

[50] *Id*. at 20.

[51] *See, e.g., In re Lewis*, 347 B.R. 769, 774 (Bankr. N.D. Kan. 2006); *Kell*y, 2009 Bankr. LEXIS 860, at *13-14 (*quoting In re Degrosseilliers*, 2008 Bankr. LEXIS 2017, 2008 Bankr. LEXIS 2017 n. 7 (Bankr. E.D. Va. 2008)).

[52] *Grady*, 343 B.R. at 751.

[53] 383 B.R. 380 (Bankr. D.S.C. 2008).

[54] *Id.* at 385.

represents a good faith effort to satisfy creditors' claims."[55] In deciding whether a chapter 13 plan is proposed in good faith, the court, in *Anstett*, considered the totality of the circumstances, including the percentage of proposed repayment, the debtor's financial situation, the term of the plan, the nature and amount of unsecured claims, the debtor's honesty in representing facts, any unusual or exceptional problems, the debtor's pre-filing conduct and the possibility of nondischargeability in a chapter 7 proceeding.[56] The court denied confirmation, concluding that the chapter 13 debtor was not proceeding in good faith where he proposed a plan for sixty (60) months but failed to increase his plan payments upon completion of the repayment of a 401(k) loan obligation, which completion would occur in month twenty (20) of the plan. *Id*. The court found it persuasive that the Debtor would be improving his situation at the expense of his unsecured creditors. With respect to relying upon Form 22C in support of the debtor's position, the court noted, "[t]he strict, mechanical application of §1325(b)(1)(B) following computation of disposable income using artificial expenditures does not necessarily satisfy the requirement to propose a plan in good faith."[57] Failing to pledge all of one's disposable income does appear to be tantamount to bad faith. It makes sense that courts may consider the debtor's ability to pay more to creditors than what is being proposed when determining whether the plan is proposed in good faith.[58] However, if this is the only ground presented in support of an objection based on bad faith, confirmation probably should not be denied.[59] Other factors must be considered. And, of course, remember that the debtor has the burden of proving all of the confirmation factors at a contested hearing.

While the goal of BAPCPA may have been to standardize the system and create more uniformity, it has, at least for now, created a large split among the courts. One of the major splits is how to calculate the dollar amount a debtor must commit in order to comply with § 1325(b). Courts are grappling with how to calculate projected disposable income and are having difficulty with the language of BAPCPA, the forms and making sure the system is respected.

II. Applicable Commitment Period: Temporal vs. Multiplier

---

55 *Id*. (*citing Neufeld v. Freeman*, 794 F.2d 149 (4th Cir. 1986)).

56 *Id*. (*citing Deans v. O'Donnell*, 692 F.2d 968 (4th Cir. 1982)).

57 *Id*. at 386 (*citing Edmunds*, 350 B.R. at 648); *In re Solomon*, 67 F.3d 1128 (4th Cir. 1995) (remanding case for consideration of good faith in the filing of the plan although the debtor had met the requirements of the version of §1325(b) then in effect)).

58 *See, e.g., Winokur*, 364 B.R. at 206. In *In re Martin*, an above-median debtor claimed a deduction on a secured debt related to a recreational boat when calculating disposable income. While the debtor is entitled to do this under law, the Court also could consider this as a factor in determining whether to confirm a plan for lack of good faith. 373 B.R. 731 (Bankr. D. Utah 2007).

59 *Winokur*, 364 B.R. at 206.

On a related note, cases involving negative disposable income according to Form 22C also present another difficult issue for courts to consider: what is the appropriate applicable commitment period of a plan, and is applicable commitment period, as provided in 11 U.S.C. §1325(b)(4) a temporal requirement or a multiplier, used only to calculate the dollar amount a debtor should commit over the life of the plan. Only two courts of appeal have addressed this issue, the Eighth and the Ninth Circuits. The Eighth Circuit, in *Frederickson*, held that the applicable commitment period is a temporal requirement, while the Ninth Circuit, in *Kagenveama*, held that if a debtor has negative disposable income according to the means test, there is no applicable commitment period.

According to 11 U.S.C. §1325(b)(4), for purposes of §1325(b), "applicable commitment period" means 3 years or not less than 5 years, if the current monthly income of the debtor and the debtor's spouse when combined, is above the median income for someone similarly situated. Not surprisingly, some of those courts that hold Form 22C is the only determiner of a debtor's projected disposable income, also hold that the applicable commitment period is a multiplier, so that if the form results in a negative number, the debtor does not have to comply with the language of §1325(b) to propose a plan of at least 60 months, even if the debtor is an above the median income earner.[60] Most courts, however, having to determine whether the applicable commitment period is either a temporal requirement or a multiplier have held that it is a temporal requirement.[61] For these courts, the express language of the statute indicates that the debtor must perform a plan for a specific time period.[62] As one court reasoned, "the strongest argument supporting the majority view is the unambiguous text…that provides a plan may be shorter than the applicable commitment period only if unsecured creditors are paid in full."[63] By using the word "period" Congress intended it to have a temporal meaning.[64] The code section also speaks only of time periods, either three or five years. If Congress had intended to make applicable commitment period to act as a multiplier, it would have stated so in the code section.[65] Congress, in other places throughout the Bankruptcy Code, used multipliers.[66] In addition, if it

60 *See In re McGillis*, 370 B.R. 720, 734 (Bankr. W.D. Mich. 2007); *In re Swan*, 368 B.R. 12, 23-27(Bankr. N.D. 2007); *In re Brady*, 361 B.R. 765 (Bankr. D.N.J. 2007); *In re Fuger*, 347 B.R. 94 (Bankr. D. Utah 2006); *In re Burrell*, Case No. 08-71716 (Bankr. C.D. Ill. June 29, 2009).

61 *In re Luton*, 363 B.R. 96 (Bankr. W.D. Ark. 2007); *In re Schanuth*, 342 B.R. 601 (Bankr. W.D.Mo. 2006); *In re Cushman*, 350 B.R. 207 (Bankr. D. S.C. 2006); *In re Davis*, 348 B.R. 449 (Bankr. E.D. Mich. 2006); *In re Nance*, 371 B.R. 358, 369 (Bankr. S.D. Ill. 2007); *In re Grant*, 364 B.R. 656, 663 (Bankr. E.D. Tenn. 2007); *In re Girodes*, 350 B.R. 31, 35 (Bankr. M.D.N.C. 2006); *In re Dew*, 344 B.R. 655, 661 (Bankr. N.D. Ala. 2006); *In re Hylton*, 374 B.R. 59 (Bankr. W.D. Va. 2007); *In re Moose*, 2009 Bankr. LEXIS 3648 (Bankr. E.D. Va. Nov. 12, 2009).

62 *Luton*, 363 B.R. at 101.

63 *In re Slusher*, 359 B.R. 290, 303 (Bankr. D.Nev. 2007).

64 *Schanuth*, 343 B.R. at 607.

65 *Nance*, 371 B.R. at 370.

66 *In re Heywyard*, No. 06-40107, 7-8 (Bankr. S.D. Ga. 2008) (citing 11 U.S.C. §§507(a)(5)(B)(i); 704(b)(2); 707(b)(2)(A)(I); 707(b)(2)(B)(iv); 707(b)(6); 707(b)(7)(A); 1322(d)(1); 1322(d)(2); 1325(b)(3); 1325 (b)(4)(A)(2); 1326(b)(3)(B)(ii)).

was to be interpreted to be a multiplier, this would be considered "'gross departure from pre-BAPCPA practice that is not justified by the language or structure of the statute."[67] Prior to the enactment of BAPCPA, chapter 13 plans were required to be at least for a three year period. Thus, it remains a time period requirement after the passage of BAPCPA. A debtor has the option to pay his creditors in full in a period less than the applicable commitment period, or he must have a plan of either three or five years, depending on whether he is considered to be an above or below median debtor.[68] The Bankruptcy Court for the Northern District of Texas explained:

> [n]ot only does this interpretation comport with what this court understands Congress to have intended by its enactment of an 'applicable commitment period' in the first place, but it has practical application in may chapter 13 cases. The first and most obvious impact of a temporal requirement is its potential to preserve for the benefit of creditors upswings in the debtor's net income during the sixty-month term.[69]

Similarly, in the recent case out of the Eastern District of Virginia, *Moose*, the bankruptcy court held that "allowing above-median income debtors to exit chapter 13 in less than five years deprives the trustee and creditors of the right to seek an increase in plan payments if the debtors' financial situation were to improve dramatically during that period."[70]

---

[67] *Id*. (*citing Schanuth*, 342 B.R. at 607)).

[68] *In re Meadows*, 410 B.R. 242, 245 (Bankr. N.D. Tex. 2009).

[69] *Id*. at 246.

[70] *Moose*, 2009 Bankr. LEXIS 3648, at *9.