# RECONCILING THE IRRECONCILABLE: CALCULATING A DEBTOR'S PROJECTED MONTHLY INCOME UNDER § 1325(B) IN LIGHT OF THE BAPCPA AMENDMENTS

KATHERINE L. SWISE*

*With unemployment levels soaring to record levels, bankruptcy is becoming an increasingly common occurrence, placing even more emphasis on fairness in bankruptcy proceedings. This Note addresses a provision of chapter 13 of the Bankruptcy Code that requires debtors to contribute all of their disposable income to the chapter 13 plan. Specifically, the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act added a definition of disposable income that appears to require an income calculation based on average income for the six months prior to the bankruptcy filing, which contradicts language in the rest of that section that appears to require a consideration of what the debtor's income will actually be during the three-or-five-year partial repayment plan. Some courts ignore debtors' actual income during the plan and require a strict adherence to the six month historical average, which has the effect of either making the plan unconfirmable or forcing debtors to pay based on income they may no longer receive. This Note explores the efficacy of various treatments of the section of the Bankruptcy Code which requires such contribution of disposable income under a partial repayment plan. The author ultimately recommends that courts adopt a hybrid approach, considering the debtor's actual income to be received during the plan period while also using the Code's definition of current monthly income to calculate income for plan purposes.*

## I. INTRODUCTION

Bankruptcy is an increasingly common occurrence these days. More than one million consumer bankruptcy cases were filed in 2008—a thirty-three percent increase over the prior year[1]—and consumer bank-

* Thanks to Professor Charles Tabb for his help and guidance with this Note. A special thanks to my friends and family, especially my husband, Ashish Shah for his unending patience and support.

1. Press Release, Am. Bankr. Inst., Consumer Bankruptcy Filings up Nearly 33 Percent in 2008 (Jan. 5, 2009), *available at* http://www.abiworld.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=56120; *see also* M.P. Dunleavey, *Bankruptcy as a Step to Solvency*, N.Y. TIMES, Jan. 24, 2009, at B6.

ruptcy filings reached 1.45 million in 2009.[2] With unemployment rates soaring to record levels,[3] the numbers are expected to continue to rise in the coming year, with personal bankruptcy filings projected to reach as many as 1.5–1.75 million in 2010.[4] Bankruptcy serves two primary functions: it helps insolvent debtors escape oppressive debts and obtain a "fresh start," and it provides a collective remedy for creditors that allows distribution of a debtor's assets to repay debts in an equitable manner.[5] The manner in which some courts have chosen to interpret a recent change to the Bankruptcy Code, however, could put these goals in jeopardy, particularly the fresh start for debtors. In fact, under an interpretation of the Code that has been adopted by courts in many recent holdings, individuals who find themselves suddenly unemployed or are forced to take a pay cut may be unable to obtain bankruptcy relief at all.[6]

In 2005, Congress implemented the most sweeping changes to the Bankruptcy Code in nearly three decades when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).[7] These changes were intended to strike a balance between the need for debtors to obtain a fresh start and the interest of creditors in repayment of their claims.[8] The result, however, was a Code leaving bankruptcy courts "awash in ambiguity"[9] and "illustrating some of the most creative examples of legislative legerdemain."[10] One such ambiguity relates to an amended provision in § 1325(b)(2) that defines "disposable income" for the purpose of determining how much an individual debtor filing for relief under chapter 13 of the Code must pay to her plan.[11]

Section 1325(b) of the Code, as amended in 2005, instructs that a court may confirm a chapter 13 plan over the objection of an unsecured creditor only so long as the debtor has committed all of his "projected disposable income" to the plan for the "applicable commitment period" required by § 1325(b)(4).[12] A dispute has arisen over how to interpret

2. Posting of Bob Lawless to Credit Slips, http://www.creditslips.org/creditslips/2009/12/guesstimate-of-2010-bankruptcy-filings.html#more (Dec. 14, 2009, 10:47) [hereinafter Lawless Credit Slips Posting].

3. *See* Ylan Q. Mui & Howard Schneider, *For Economy, Another Thumping*, WASH. POST, Feb. 6, 2009, at D2.

4. *See* Lawless Credit Slips Posting, *supra* note 2; *see also* Justin Berton, *Lawyers See Boom in Bankruptcies*, S.F. CHRON., Jan. 13, 2009, at D1; Posting of Bob Lawless to Lawblog—VerdictOne.com, http://verdictone.com/lawblog/?p=3541 (Dec. 18, 2008).

5. CHARLES J. TABB, THE LAW OF BANKRUPTCY 3–4 (2d ed. 2009).

6. *See, e.g.*, eCast Settlement Corp. v. May (*In re* May), 381 B.R. 498, 506–07 (Bankr. W.D. Pa. 2008); *In re* Hardacre, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006).

7. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. §§ 101–1532 (2006)); *see also* Eugene R. Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA*, 2007 U. ILL. L. REV. 31, 31.

8. Alane A. Becket & William A. McNeal, *Projected Disposable Income in Chapter 13: A Menu of Fact, Fiction and Forms*, AM. BANKR. INST. J., May 2007, at 20, 20.

9. *In re* Greer, 388 B.R. 889, 890 (Bankr. C.D. Ill. 2008).

10. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 485 (2005).

11. 11 U.S.C. § 1325(b)(2) (2006).

12. *Id.* § 1325(b)(1), (4).

this provision in light of the addition of § 1325(b)(2). The Code does not provide a definition of "projected disposable income"; however, § 1325(b)(2) defines "disposable income" as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended."[13] Current monthly income, in turn, is defined in § 101(10A) of the Code as an average of the debtor's income in the six months preceding the bankruptcy filing.[14] Because the Code defines only "disposable income," courts are divided over what meaning to give the word "projected" in calculating the amount a debtor must pay to unsecured creditors.[15] So the central question courts must answer is whether "projected disposable income" means something other than "disposable income" as defined in § 1325(b)(2).[16]

This Note analyzes the various interpretations of "projected disposable income" offered by courts since the inception of BAPCPA. First, Part II of this Note offers some background on the history of the Code and the debate leading up to the drastic changes implemented by BAPCPA. It also includes an explanation of the Code sections relevant to the discussion, focusing especially on the changes made to § 1325(b). Part III analyzes the three primary theories courts have developed to interpret the meaning of "projected disposable income." Finally, Part IV discusses the adequacy of these three theories and makes a recommendation as to which interpretation best applies the statute in a manner that is both workable and in line with congressional intent.

## II. BACKGROUND

To understand the implications of the changes to § 1325(b), it is necessary to have some understanding of how the changes came about. Section A of this Part provides a brief history of bankruptcy law in the United States. Next, Section B focuses on the events leading up to the enactment of BAPCPA in 2005. Finally, Section C explains the best efforts test of § 1325(b) and how BAPCPA changed its application.

### *A. History of Bankruptcy*

The power to enact bankruptcy laws is granted to Congress by the Constitution.[17] This power is granted exclusively to Congress in order to create a uniform law throughout the nation, thus preventing debtors

13. *Id.* § 1325(b)(2).

14. *Id.* § 101(10A).

15. *See, e.g.*, *In re* Rush, 387 B.R. 26, 30 (Bankr. W.D. Mo. 2008) (noting that the changes to § 1325(b) "have spawned an avalanche of cases in which the courts have attempted to interpret these provisions"); Becket & McNeal, *supra* note 8, at 20 (noting that the changes to § 1325(b) have "resulted in a variety of opinions interpreting the effect of the word 'projected'").

16. *See, e.g.*, *In re* DeThample, 390 B.R. 716, 721 (Bankr. D. Kan. 2008).

17. U.S. CONST. art. I, § 8, cl. 4.

from traveling to a different state to avoid payment to creditors.[18] Several bankruptcy laws were passed in the first hundred years of the nation's history; however, all were temporary and generally enacted in response to an economic crisis.[19] Congress enacted the first permanent bankruptcy law in 1898.[20] The Bankruptcy Act of 1898—though more debtor friendly than previous bankruptcy laws—focused mainly on facilitating the sale and distribution of the debtor's assets to creditors.[21] This law remained in place, with only one major revision, for eighty years.[22]

By the 1960s there was a growing dissatisfaction with the 1898 Act.[23] Critics claimed the Act was outdated and contained "opaque language" that was largely ignored by courts.[24] Additionally, the considerable increase in consumer credit during the preceding decade signaled a need to "modernize" the bankruptcy laws.[25] In response to these concerns, Congress created an advisory commission in 1970 to study the existing bankruptcy laws and recommend changes.[26] The result was the Bankruptcy Reform Act of 1978.[27] This Act established the foundation for the current bankruptcy laws (the Code).[28]

The 1978 Act was heavily criticized from the beginning.[29] Complaining the loudest was the consumer credit industry, which blamed the new Code for a spike in bankruptcy filings among consumer debtors.[30] Within a few years, the consumer credit industry had proposed "major

18. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995).

19. *See id.* at 14–19. The bankruptcy laws throughout the nineteenth century were generally in response to a national crises of some kind. The Bankruptcy Act of 1800 followed an economic crash during the 1790s and was repealed after three years. *Id.* at 14. The Bankruptcy Act of 1841 followed the Panic of 1837 and was repealed in less than two years. *Id.* at 16–17. Finally, the Bankruptcy Act of 1867 was passed in response to the Panic of 1857 and the Civil War, and it was repealed in 1878. *Id.* at 19.

20. *Id.* at 23; *see also* JEFF FERRIELL & EDWARD J. JANGER, UNDERSTANDING BANKRUPTCY 136 (2d ed. 2007).

21. TABB, *supra* note 5, at 44.

22. The one major revision was the Chandler Act of 1938, which was enacted in the wake of the Great Depression. *Id.* at 45.

23. FERRIELL & JANGER, *supra* note 20, at 137.

24. *Id.*

25. William T. Vukowich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 GEO. L.J. 1129, 1132 (1983).

26. TABB, *supra* note 5, at 45; *see also* FERRIELL & JANGER, *supra* note 20, at 137.

27. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101–1532 (2006)); TABB, *supra* note 5, at 45–46.

28. FERRIELL & JANGER, *supra* note 20, at 137.

29. *Id.* at 138 (reporting that the Code "almost immediately became the subject of much debate and many calls for revision").

30. *Id.* (calling the Code "a virtual charter for deadbeats"); *see also* TABB, *supra* note 5, at 48 (noting that the credit industry was "unhappy with skyrocketing bankruptcy filings and mounting bad debt losses"); Vukowich, *supra* note 25, at 1129 (describing the credit industry as "[s]tunned by an unprecedented increase in the number of consumer bankruptcies since the new Act's effective date"). Though consumer bankruptcies were clearly on the rise following the enactment of the 1978 Act, there appears to be little evidence that the Act is what caused this spike. *See* FERRIELL & JANGER, *supra* note 20, at 138; Vukowich, *supra* note 25, at 1131 (claiming there was, at best, "a weak correlation between the two").

reforms" to the 1978 Act that would require consumer debtors to pay back more of their unsecured debt.[31] The consumer credit industry's main concern was that debtors who actually had an ability to repay part or all of their unsecured debts were receiving complete discharges of those debts by filing for liquidation under chapter 7 of the Code, rather than reorganizing their debts into a repayment plan under chapter 13 of the Code.[32]

The 1978 Act had sought to make chapter 13 the primary method of relief for consumer debtors.[33] Congress apparently believed that, given the choice, debtors would choose to make payments to their unsecured creditors, rather than discharging those debts in a chapter 7 liquidation.[34] By making chapter 13 more attractive to individual debtors, the hope was to provide relief that would benefit both the debtor and the creditor.[35] The benefits that a repayment plan provides to creditors are obvious, but Congress also sweetened the deal for debtors by offering inducements to file under chapter 13.[36] Principal among these inducements was the so-called "super discharge," which allowed chapter 13 debtors to discharge debts that were not dischargeable under chapter 7,[37] as well as the ability to retain nonexempt property (property that would be liquidated under chapter 7).[38] Though urged to do so by consumer credit groups, Congress stopped short of making chapter 13 compulsory for certain debtors.[39]

Congress's hopes for chapter 13 were not realized, however, as the majority of debtors chose liquidation under chapter 7, despite the inducements to file under chapter 13.[40] It seemed as though "[t]he 'opportunity' to pay creditors more money for several years under chapter 13 is one that many consumer debtors happily ignore[d]."[41] Even when debtors did choose to file under chapter 13, most only paid nominal pay-

31. *See* Vukowich, *supra* note 25, at 1129–30.

32. *Id.*

33. Tabb, *supra* note 18, at 35.

34. TABB, *supra* note 5, at 1202.

35. *See* Ravenot v. Rimgale (*In re* Rimgale), 669 F.2d 426, 427 (7th Cir. 1982); TABB, *supra* note 5, at 1202. *But see* Teresa A. Sullivan et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, 1097 (suggesting that Congress at the same time actually reduced incentive to file chapter 13 by substantially increasing the property exempt from sale under chapter 7).

36. FERRIELL & JANGER, *supra* note 20, at 641–42; Tabb, *supra* note 18, at 35–36.

37. Tabb, *supra* note 18, at 35–36. Under the 1978 Act, most types of debts that were not dischargeable under chapter 7 could be discharged under chapter 13. In fact, until 1990, only two types of debts were not dischargeable under chapter 13—long-term debts that extended past the end of the plan period, and domestic support obligations. TABB, *supra* note 5, at 1279. Congress drastically limited the scope of the super discharge with the BAPCPA amendments, however, adding several types of debts to the list of exceptions from the discharge. *Id.* at 1279–80.

38. *See* FERRIELL & JANGER, *supra* note 20, at 641–42; Tabb, *supra* note 18, at 35–36; Vukowich, *supra* note 25, at 1134.

39. Tabb, *supra* note 18, at 35.

40. TABB, *supra* note 5, at 1202 ("Most debtors would prefer to liquidate immediately under chapter 7, receive a discharge, and move on."); Vukowich, *supra* note 25, at 1135 ("Less than thirty percent of debtors elect chapter 13.").

41. TABB, *supra* note 5, at 1202.

ments to unsecured creditors.[42] Some courts attempted to combat this problem by holding that the "good faith" provision of chapter 13[43] required that the debtor's plan provide for "meaningful" payments to unsecured creditors.[44] This attempt largely failed, however, as the majority of appellate courts rejected this interpretation.[45]

This dissatisfaction prompted the consumer lending industry to propose significant amendments to the 1978 Act.[46] The proposals were driven by the credit industry's belief that "a significant proportion of debtors" receiving a full discharge of debts actually had the ability to pay off a large part of those debts over a five-year period.[47] The credit industry proposed to deny chapter 7 relief to debtors who were able to repay debts over a period of not more than five years using their "anticipated future income."[48] The proposed amendment would have also eliminated the super discharge, "making chapter 13 discharges and chapter 7 discharges identical."[49] The credit industry justified its proposals on the basis that chapter 7 and its liberal discharge policies were better suited to commercial debt than consumer debt, and that consumer debt was expected to be paid out of future income, rather than the liquidation of assets.[50]

Though this proposal was largely defeated, the credit industry did get some of what it wished for when Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984.[51] This amendment to the 1978 Act allowed courts to deny chapter 7 relief if providing such relief would constitute a "substantial abuse" of the bankruptcy provisions.[52] This provision allowed courts to find abuse in cases where the debtor's income exceeded his expenses such that he could repay unsecured debtors over a period of time.[53] If a chapter 7 case was dismissed following a finding of abuse, the debtor's only remaining choice for relief was to file a petition under chapter 13.[54] Congress, however, failed to define "sub-

---

42. Vukowich, *supra* note 25, at 1135.

43. 11 U.S.C. § 1325(a)(3) (2006) (providing that a chapter 13 repayment plan cannot be confirmed by the bankruptcy court unless it was "proposed in good faith and not by any means forbidden by law").

44. Vukowich, *supra* note 25, at 1136.

45. *Id.*; *see also* Ravenot v. Rimgale (*In re* Rimgale), 669 F.2d 426, 431 (7th Cir. 1982) ("[G]ood faith cannot be treated as a license to read into the statute requirements Congress did not enact, *e.g.*, a requirement that a plan pay 70% of unsecured claims to qualify for the discharge benefits.").

46. Vukowich, *supra* note 25, at 1142–43. Though other organizations also submitted reform proposals, the proposal submitted by the consumer credit industry received the most attention and was more aggressively lobbied. *Id.* at 1142.

47. *Id.* at 1129–30. The credit industry based this assertion on a study it commissioned that concluded that up to thirty percent of consumer debtors could have repaid their nonmortgage debts. *See* Sullivan et al., *supra* note 35, at 1117.

48. Vukowich, *supra* note 25, at 1142.

49. *Id.* at 1143.

50. *Id.* at 1146.

51. Tabb, *supra* note 18, at 39.

52. FERRIELL & JANGER, *supra* note 20, at 139.

53. TABB, *supra* note 5, at 180.

54. *Id.*

stantial abuse," leaving it entirely up to the courts to determine under what circumstances a case could be dismissed as an abuse.[55] The credit industry was not entirely satisfied with these changes, though, and continued to lobby for additional amendments.[56] From the creditors' point of view, the substantial abuse test was too vague and allowed too much judicial discretion, with the result that many debtors who actually could repay some of their debt continued to received full discharges.[57] But there would not be any significant changes to the consumer provisions of the Bankruptcy Code until the enactment of BAPCPA in 2005.[58]

### *B. The Beginnings of BAPCPA*

Beginning in the mid-1990s, the focus again shifted to the perceived abuses of consumer bankruptcy filings.[59] In 1994, Congress passed a major bankruptcy reform act that, among other things, created another advisory commission to study the Code and propose reforms.[60] The consumer credit industry used this new commission as an opportunity to lobby for additional changes to the consumer bankruptcy provisions.[61] Specifically, the industry lobbied hard for amendments that would limit consumer access to chapter 7 liquidation.[62] The credit industry proposed a detailed "means test" to prevent debtors with the ability to repay a portion of their unsecured debt from filing for chapter 7 relief.[63] In addition to excluding so-called "can pay" debtors from chapter 7, the credit industry hoped the means test would also limit the discretion of bankruptcy judges in determining what constituted an abuse.[64]

The commission reported its findings to Congress in 1997.[65] Although the commission officially rejected the credit industry's "anti-debtor views,"[66] a group of dissenting commissioners strongly opposed the commission's recommendations regarding consumer bankruptcy reform, arguing for provisions that would go farther in penalizing and de-

55. *See In re* Krohn, 886 F.2d 123, 126 (6th Cir. 1989); *see also* Richard E. Coulson, *Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge*, 62 ALB. L. REV. 467, 504–05 (1998).

56. Tabb, *supra* note 18, at 40.

57. Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463, 466 (2007).

58. FERRIELL & JANGER, *supra* note 20, at 141 ("The 2005 legislation implemented controversial but sweeping changes in the role that bankruptcy will play in the lives of consumer debtors.").

59. *Id.*

60. *Id.* at 140; TABB, *supra* note 5, at 52.

61. Jensen, *supra* note 10, at 486 ("The establishment of the National Bankruptcy Review Commission in 1994 either intentionally or unintentionally galvanized the consumer creditor community and ultimately became the impetus for BAPCPA."); *see also* Fred R. Bleakley, *Creditors Seek Tougher Bankruptcy Laws*, WALL ST. J., Dec. 17, 1996, at A2.

62. *See* FERRIELL & JANGER, *supra* note 20, at 141; TABB, *supra* note 5, at 52.

63. FERRIELL & JANGER, *supra* note 20, at 141; Tabb & McClelland, *supra* note 57, at 466.

64. Tabb & McClelland, *supra* note 57, at 466.

65. Jensen, *supra* note 10, at 487.

66. TABB, *supra* note 5, at 52.

terring abuse by consumer debtors.[67] These dissenters argued that bankruptcy had become a first, rather than a last, resort for many debtors, which indicated that relief was far too easy to obtain.[68] This had the undesired effect of making bankruptcy "a way for reckless spenders to escape their debts."[69] According to the dissenters, the epidemic of bankruptcy filings led to staggering losses for the credit industry, which ultimately led to increased interest rates and costs for nonbankrupt consumers.[70] Furthermore, the vagueness and uncertainty in the current Code led to inconsistent results among the bankruptcy courts.[71]

The arguments of the dissenting commissioners eventually became the arguments for the new consumer provisions enacted in BAPCPA.[72] It would be some time, however, before the passage of BAPCPA occurred. Presidential impeachment hearings, terrorist attacks, and anthrax scares (in addition to less dramatic events) delayed the consideration of the new legislation by Congress.[73] Finally, on April 20, 2005, President Bush signed BAPCPA into law.[74] The new law contained many of the provisions that had been lobbied for by the credit industry and supported by the dissenting members of the advisory commission.[75] Most significantly, BAPCPA introduced a sophisticated means test, barring access to chapter 7 liquidation for debtors with the ability to repay some of their unsecured debts.[76] Though Congress again declined the opportunity to make chapter 13 compulsory for certain debtors, the changes under the BAPCPA indicate a further intent to push debtors toward a "voluntary" chapter 13 filing by limiting access to chapter 7.[77]

### *C. The § 1325(b) "Best Efforts" Test*

The "best efforts" test of § 1325(b) has been a part of the Code since the 1984 amendments.[78] It provides that a chapter 13 plan may not be confirmed over the objection of the trustee or an unsecured creditor unless the plan provides either for payment in full of all unsecured debt or that all the debtor's disposable income will be paid to unsecured credi-

---

67. Jensen, *supra* note 10, at 477–88.

68. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 1044 (1997) (National Bankruptcy Review Commission Final Report), http://govinfo.library.unt.edu/nbrc/report/24commvi.pdf [hereinafter COMMISSION REPORT]; *see also* Jensen, *supra* note 10, at 488–89.

69. Jensen, *supra* note 10, at 495 (citation omitted).

70. *Id.*

71. COMMISSION REPORT, *supra* note 68, at 1044; *see also* Jensen, *supra* note 10, at 489.

72. Jensen, *supra* note 10, at 489.

73. *Id.* at 485; *see also* FERRIELL & JANGER, *supra* note 20, at 141.

74. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. §§ 101–1532 (2006)).

75. FERRIELL & JANGER, *supra* note 20, at 141; TABB, *supra* note 5, at 52–53.

76. FERRIELL & JANGER, *supra* note 20, at 141–42.

77. *See id.* at 141.

78. Christopher Frost, *Plain Meaning and Unintended Results Under BAPCPA:* In re Kagenveama, BANKR. L. LETTER, Aug. 2008, at 1, 1.

tors.[79] But the 1984 amendments failed to define exactly what "disposable income" meant.[80] Specifically, the Code gave no guidance as to what constituted "income" for purposes of this calculation.[81] Therefore, bankruptcy judges had a lot of discretion to make such determinations, resulting in significant variation among districts.[82]

BAPCPA made three primary changes to § 1325(b):[83] (1) § 1325(b)(2) was amended to define "disposable income";[84] (2) a definition of necessary expenses was added, which applies the means test to debtors earning more than the state median income for the purposes of determining allowable expenses ("above-median debtors");[85] and (3) the concept of the "applicable commitment period" was introduced.[86] These changes were an apparent attempt to limit the discretion that bankruptcy judges previously enjoyed in confirming chapter 13 plans in an attempt to make application of the best efforts test uniform among the courts.[87]

BAPCPA now defines disposable income as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended."[88] The Code defines "current monthly income" in § 101(10A) as "the average monthly income from all sources that the debtor receives . . . during the 6-month period" preceding the filing of the bankruptcy petition.[89] This definition includes nontaxable sources of income, such as pensions, but excludes Social Security income.[90] The debtor's current monthly income is generally calculated by averaging all qualifying sources of income received by the debtor (or debtors, in the case of a joint filing) over the six-month period preceding the bankruptcy filing.[91] For above-median debtors, "amounts reasonably necessary to be expended" is determined in accordance with the means test of § 707(b)(2).[92] The calculation of current monthly income is an important component in the means test, as courts must first determine what a debtor's income is before the means test can be applied.[93]

79. 11 U.S.C. § 1325(b)(1).

80. Joseph P. Corish & Michael J. Herbert, *The Debtor's Dilemma: Disposable Income as the Cost of Chapter 13 Discharge in Consumer Bankruptcy*, 47 LA. L. REV. 47, 55–56 (1986).

81. *See id.* at 62.

82. *In re* Simms, No. 06-1206, 2008 WL 217174, at *3 (Bankr. N.D.W. Va. Jan. 23, 2008); *see also* Corish & Herbert, *supra* note 80, at 61–63.

83. Frost, *supra* note 78, at 1.

84. 11 U.S.C. § 1325(b)(2).

85. *Id.* § 1325(b)(3).

86. *Id.* § 1325(b)(4).

87. Frost, *supra* note 78, at 1.

88. 11 U.S.C. § 1325(b)(2).

89. *Id.* § 101(10A).

90. *Id.*; 2 COLLIER ON BANKRUPTCY (MB) ¶ 101.10A (Lawrence P. King et al. eds., 15th ed. rev. 2008).

91. 11 U.S.C. § 101(10A).

92. *Id.* § 1325(b)(3).

93. 2 COLLIER ON BANKRUPTCY, *supra* note 90, ¶ 101.10A; Tabb & McClelland, *supra* note 57, at 474.

BAPCPA added the means test to § 707(b) of the Code, and it includes many of the elements suggested by the dissenting members of the advisory commission and the consumer credit industry.[94] This new provision replaced the "substantial abuse" test introduced in the 1984 amendments with a new test that creates a *presumption* of abuse for debtors whose income exceeds their expenses by a prescribed amount.[95] Under the old substantial abuse test, courts had broad discretion as to what constituted an abuse, because the Code did not provide a definition of "substantial abuse."[96] The new means test eliminated much of this judicial discretion, and replaced it with an "excruciatingly detailed" mathematical formula to determine what level of excess income would create a presumption of abuse.[97] A debtor may rebut this presumption by showing that "special circumstances" exist to justify "adjustments of current monthly income for which there is no reasonable alternative."[98] Debtors who are unable to rebut this presumption by a showing of special circumstances will have their chapter 7 petition dismissed.[99] The debtor then has the choice of voluntarily converting to a reorganization plan under chapter 13 or dropping the petition entirely.[100]

Not all debtors are subject to the presumption of abuse.[101] Specifically, the means test is inapplicable to debtors who earn equal to or less than the state median income for a similar family size.[102] Once it is determined that the debtor falls into the above-median category, however, the debtor's income is subject to further calculations to determine whether the debtor's remaining income is sufficient to trigger a presumption of abuse.[103] It is important to note, however, that the presumption of abuse is not the only way in which a debtor's case can be dismissed.[104]

---

94. 11 U.S.C. § 707(b); Jensen, *supra* note 10, at 489–90; Tabb & McClelland, *supra* note 57, at 466–67.

95. 11 U.S.C. § 707(b)(2)(A); Tabb & McClelland, *supra* note 57, at 467.

96. *See In re* Hardacre, 338 B.R. 718, 720–21 (Bankr. N.D. Tex. 2006); TABB, *supra* note 5, at 180.

97. TABB, *supra* note 5, at 181; *see also Hardacre*, 338 B.R. at 721; Tabb & McClelland, *supra* note 57, at 497–98.

98. 11 U.S.C. § 707(b)(2)(B)(i); *see also* Tabb & McClelland, *supra* note 57, at 468. Congress did not define "special circumstances" in the Code; however, it did indicate that a serious medical condition or a call to active military service are examples of qualifying circumstances. 11 U.S.C. § 707(b)(2)(B)(i).

99. 11 U.S.C. § 707(b); Tabb & McClelland, *supra* note 57, at 470.

100. Tabb & McClelland, *supra* note 57, at 470.

101. *Id.* at 467.

102. 11 U.S.C. § 707(b)(7); Wedoff, *supra* note 7, at 46.

103. *See* Tabb & McClelland, supra note 57, at 470–71. The debtor's remaining monthly income is calculated by subtracting allowable monthly deductions from the calculated current monthly income. The presumption of abuse is triggered if the debtor's remaining monthly income, when multiplied by 60, exceeds the lesser of (1) 25% of unsecured debt or $6000, whichever is greater; or (2) $10,950. 11 U.S.C. § 707(b)(2)(A)(i); *see also* Tabb & McClelland, *supra* note 57, at 471.

104. *See* Tabb & McClelland, *supra* note 57, at 468.

Below-median debtors may not be subject to a presumption of abuse, but the court may still find abuse on other grounds, such as bad faith.[105]

The third major change to § 1325(b) was the introduction of the "applicable commitment period." Prior to BAPCPA, the Code provided for a three-year period, which could be extended to a maximum of five years upon a showing of good cause.[106] BAPCPA now defines the applicable commitment period of a chapter 13 plan as three years for debtors earning less than the state median income for a similar family size and "not less than five years" for debtors earning more than the state median income for a similar family size.[107]

## III. ANALYSIS

There are two events that must take place before the calculation of projected disposable income even becomes necessary: (1) the chapter 13 plan must propose to pay less than 100% of a debtor's unsecured claims and (2) the trustee or an unsecured creditor must object to the plan.[108] Once an objection to the plan is raised, the court must then analyze how to define and calculate "projected disposable income," so that it may ensure that the debtor pays all such income to the plan.[109] Since the enactment of BAPCPA, courts have been unable to reach an agreement as to the intended meaning of "projected disposable income" and how this income, once defined, should be calculated.[110] Specifically, courts disagree as to whether "projected disposable income" referenced in § 1325(b)(1) has a different meaning than "disposable income," which is defined in § 1325(b)(2) as amended by BAPCPA.[111] As one court put it, BAPCPA "took the relatively simple application of § 1325(b) and rendered it a murky stew of conflicting judicial opinions about the plain language meaning of common words and phrases contained in the statute itself and the Congressional intent behind it."[112]

Prior to BAPCPA, bankruptcy courts calculated a debtor's projected disposable income simply by subtracting her expenses from her income.[113] The debtor filed with the court a schedule I,[114] which listed all

105. 11 U.S.C. § 707(b)(1), (3); Tabb & McClelland, *supra* note 57, at 469; Wedoff, *supra* note 7, at 46.

106. Maney v. Kagenveama (*In re* Kagenveama), 527 F.3d 990, 998 (9th Cir. 2008), *amended by* 541 F.3d 868 (9th Cir. 2008); FERRIELL & JANGER, *supra* note 20, at 667.

107. 11 U.S.C. § 1325(b)(4)(A). The state median income is determined by U.S. Census Bureau information from the most recent year preceding the bankruptcy petition. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(k), 119 Stat. 23, 35 (2005) (codified at 11 U.S.C. § 101(39A)); Wedoff, *supra* note 7, at 48. Census information is available at U.S. Census Bureau, Income, http://www.census.gov/hhes/www/income/statemedfaminc.html (last visited Jan. 30, 2010).

108. 11 U.S.C. § 1325(b)(1); *In re* Gonzalez, 388 B.R. 292, 297 (Bankr. S.D. Tex. 2008).

109. *Gonzalez*, 388 B.R. at 298.

110. Becket & McNeal, *supra* note 8, at 20.

111. *See id.*

112. *In re* Green, 378 B.R. 30, 33 (Bankr. N.D.N.Y. 2007).

113. *In re* Rush, 387 B.R. 26, 29 (Bankr. W.D. Mo. 2008).

her income, and a schedule J,[115] which listed all his expenses. The court reviewed the schedule J for "reasonableness" of the expenses, and the amount remaining after subtracting the amount on the schedule J from the amount on the schedule I was the amount that would be paid to the chapter 13 plan.[116] With the addition of the definition of "disposable income" in § 1325(b)(2), a new form—schedule B22C[117]—which calculates a debtor's disposable income according to the current monthly income calculation from § 101(10A) and, for above-median debtors, the expense calculation from the means test of § 707(b).[118] The debate over projected disposable income is fueled by the addition of § 1325(b)(2), linking the disposable income calculation to current monthly income, which is based on a historical average.[119] Courts differ as to how to reconcile the historical nature of the current monthly income calculation with the forward-looking implications of "projected" disposable income.[120] Specifically, there is ambiguity as to whether "projected disposable income" should be based on the debtor's average income for the six months prior to bankruptcy, or the debtor's actual income as of the effective date of the chapter 13 plan.[121]

In the many decisions regarding projected disposable income that have been handed down since the inception of BAPCPA, the courts all purport to apply the "plain language" of the statute in reaching their conclusion.[122] Most courts follow the rule that requires them to give meaning to every word in the statute and to presume that Congress selected the particular language of the statute intentionally and purposefully.[123] Yet, while purportedly applying the same standard, bankruptcy courts have reached some very different conclusions.[124] There are currently three competing theories as to how to calculate a debtor's projected disposable income.[125] The first theory holds that the word "projected" is simply a modifier of the term "disposable income," and the historical calculation embodied in the schedule B22C and the definition

---

114. 11 U.S.C. app. sched. I (2007), http://www.uscourts.gov/rules/BK_Forms_1207/B_006I_1207f.pdf.

115. 11 U.S.C. app. sched. J (2007), http://www.uscourts.gov/rules/BK_Forms_1207/B_006J_1207f.pdf.

116. *Rush*, 387 B.R. at 29; *In re* Alexander, 344 B.R. 742, 746 (Bankr. E.D.N.C. 2006).

117. 11 U.S.C. app. form 22C (2008), http://www.uscourts.gov/rules/BK_Forms_08_Official/B_022C_0108v2.pdf; FED. R. BANKR. P. 1007(b)(6).

118. Frost, *supra* note 78, at 3.

119. *See, e.g.*, Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 307–08 (B.A.P. 1st Cir. 2007).

120. *Id.*

121. *In re* Hardacre, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006).

122. *See, e.g.*, *In re* DeThample, 390 B.R. 716, 722 (Bankr. D. Kan. 2008) (noting that "[all] camps ride under the banner of 'plain meaning'").

123. *See, e.g.*, *In re* Jass, 340 B.R. 411, 415 (Bankr. D. Utah 2006).

124. *In re* Gonzalez, 388 B.R. 292, 297 (Bankr. S.D. Tex. 2008) (noting that the decisions analyzing § 1325(b) "are uniform neither in result nor in reasoning").

125. *In re* Rush, 387 B.R. 26, 30 (Bankr. W.D. Mo. 2008).

of current monthly income is controlling.[126] The second theory is that the current income calculation and schedule B22C are controlling, but create only a "rebuttable presumption" of the debtor's disposable income.[127] Finally, the third theory is that the calculation of disposable income under § 1325(b)(2) is necessarily a forward-looking calculation that must take into account income that the debtor *actually anticipates* receiving during the applicable commitment period.[128] The last two theories are closely related, as they both interpret the statute to allow consideration of future income.[129] They differ, however, as to the circumstances under which future income may be considered and the role of the current monthly income as defined in § 101(10A) in calculating disposable income. Additionally, each raises separate concerns, and so they are discussed separately.

### *A. The "Historical" Approach: The B22C Calculation Controls*

The historical approach, as its description indicates, requires strict adherence to the six-month historical average income calculation of § 101(10A) in calculating a debtor's disposable income.[130] The schedule B22C calculation of the six-month historical average minus necessary expenses allowed by the means test equals the debtor's disposable income.[131] Courts adopting the historical approach have also generally held that "projected disposable income" and "disposable income" are inherently the same thing.[132] Projected disposable income is simply determined by multiplying the disposable income as calculated on the schedule B22C by the number of months in the applicable commitment period.[133]

The leading case promoting this theory is *In re Kagenveama*, decided by the Ninth Circuit in 2008.[134] In *Kagenveama*, the Ninth Circuit held that "projected disposable income" simply meant "disposable income" as defined by § 1325(b)(2), "projected" (i.e., "multiplied") over the applicable commitment period.[135] The debtor in *Kagenveama* had calculated her disposable income according to the B22C form required

126. *See, e.g.*, Maney v. Kagenveama (*In re* Kagenveama), 527 F.3d 990, 995 (9th Cir. 2008), *amended by* 541 F.3d 868 (9th Cir. 2008).

127. *See, e.g.*, *Jass*, 340 B.R. at 418.

128. *See, e.g.*, *In re* Hardacre, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006).

129. *Compare id.* (holding that projected income means the debtor's "anticipated income during the term of the plan," and therefore "projected" disposable income is different from disposable income), *with Jass*, 340 B.R. at 418 (holding that projected is a future-oriented term, but that projected disposable income is presumed to be the same as disposable income, absent a showing of special circumstances).

130. *See In re* Greer, 388 B.R. 889, 892–93 (Bankr. C.D. Ill. 2008).

131. *See In re* Alexander, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006).

132. *See id.*; *see also* Becket & McNeal, *supra* note 8, at 66.

133. *Alexander*, 344 B.R. at 749 ("[I]n order to arrive at 'projected disposable income,' one simply takes the calculation mandated by § 1325(b)(2) and does the math.").

134. 527 F.3d 990 (9th Cir. 2008), *amended by* 541 F.3d 868 (9th Cir. 2008).

135. *Id.* at 994–95.

for chapter 13 debtors, and the resulting amount was a negative number.[136] The debtor subsequently concluded that because she had no "disposable income," she also had no "projected disposable income."[137] With no projected disposable income, she had no obligation to pay any amount to unsecured creditors, though she voluntarily filed a plan that would pay $1000 per month to her unsecured creditors.[138] According to the schedule I and schedule J figures, however, the debtor had more than $1500 in excess monthly income.[139] The trustee contested the debtor's plan on the grounds that she had not proposed to pay all her projected disposable income to the plan.[140] The trustee then urged the court to adopt a forward-looking approach to calculating disposable income that looks at a debtor's anticipated income and expenses, or, in the alternative, to use the income calculation from schedule B22C as merely a presumption of disposable income that may be rebutted upon a showing of changed circumstances.[141]

The Ninth Circuit rejected both theories advocated by the trustee and instead adopted the debtor's interpretation, holding that "[r]eading the statute as requiring 'disposable income,' as defined in *subsection (b)(2)*, to be projected out over the 'applicable commitment period' to derive the 'projected disposable income' amount is the most natural reading of the statute, and it is the one we adopt."[142] First, the Ninth Circuit rejected the idea that "projected disposable income" could be separated from "disposable income."[143] Rather, the court claimed that "the plain language of § 1325(b) links 'disposable income' to 'projected disposable income' . . . ."[144] Second, the Ninth Circuit rejected the suggestion that current monthly income as calculated by schedule B22C created merely a presumption of disposable income, arguing that there was no language in the Code suggesting that a calculation of income created a presumption that could be modified based on anticipated future income.[145] The court pointed out that there were places in the Code where a presumption was in fact created, such as that created in the means test of § 707(b).[146] This indicated to the court that Congress knows how to create a presumption where one is intended, and the exclusion of explicit language creating a presumption in this case must be interpreted as deliberate.[147]

136. *Id.* at 993.
137. *Id.* at 993–94.
138. *Id.* at 993.
139. *Id.*
140. *Id.*
141. *Id.* at 996.
142. *Id.* at 994–95 (emphasis added).
143. *Id.* at 996.
144. *Id.*
145. *Id.*
146. *Id.* at 997.
147. *Id.* at 996–97.

The Ninth Circuit acknowledged that the schedule B22C calculation of disposable income often results in a lower amount of disposable income than does the old method of using just the income and expenses reported on the schedules I and J, thus resulting in a plan that is less favorable to unsecured creditors.[148] But the court was not willing to read nonexistent terms into the Code "simply to arrive at a more favorable result for unsecured creditors."[149] Furthermore, the court emphasized that any undesirable effects of the changes to the Code were not to be remedied by the courts, but through additional amendments by Congress.[150]

Many courts favor the historical approach, finding that it best conforms with a clear congressional intent to reduce discretion among bankruptcy judges.[151] These courts hold that the purpose of the BAPCPA amendments was to create an objective method of calculating disposable income in order to achieve more consistent results and prevent debtor abuse.[152] The courts endorsing them further argue that, although the calculation of projected disposable income was a forward-looking concept prior to BAPCPA's enactment, the reference to current monthly income in the new definition of disposable income indicates a clear intent by Congress to change direction.[153] Therefore, an interpretation of disposable income that allows consideration of anticipated income "eviscerates the purpose and effect of the historical average."[154]

There are two primary problems with the historical approach. First, such strict adherence to the historical calculation of current monthly income ignores the future-oriented language in the remainder of § 1325(b) and effectively renders these terms meaningless.[155] Most significantly, this approach completely disregards the requirement in § 1325(b) that the debtor must contribute all her "projected disposable income *to be received* in the applicable commitment period" to the plan.[156] This language clearly indicates that § 1325(b) contemplates that the debtor will contribute her *actual* income during the plan period, rather than an average of her past income.[157]

148. *Id.* at 997; *see also In re* Alexander, 344 B.R. 742, 746–47 (Bankr. E.D.N.C. 2006) (noting that a lower calculation of disposable income "is the typical result for above-median income debtors under the new law").

149. *Kagenveama*, 527 F.3d at 997.

150. *Id.*

151. *See, e.g.*, *In re* Greer, 388 B.R. 889, 893 (Bankr. C.D. Ill. 2008) ("To retain judicial discretion is to disregard the definition of CMI."); Mancl v. Chatterton (*In re* Mancl), 381 B.R. 537, 541 (Bankr. W.D. Wis. 2008) ("[T]he brightline test of the amended § 1325(b) is a purely mechanical endeavor admitting of no discretion.").

152. *Mancl*, 381 B.R. at 541–42.

153. *Greer*, 388 B.R. at 891–92; *Alexander*, 344 B.R. at 748.

154. *Greer*, 388 B.R. at 893.

155. *In re* Demonica, 345 B.R. 895, 900 (Bankr. N.D. Ill. 2006); *In re* Hardacre, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006).

156. 11 U.S.C. § 1325(b)(1)(B) (2006) (emphasis added).

157. *See, e.g.*, *Hardacre*, 338 B.R. at 723; *see also In re* Gonzalez, 388 B.R. 292, 304–05 (Bankr. S.D. Tex. 2008).

Second, a strict application of the six-month historical average in calculating disposable income could lead to some thoroughly undesirable results.[158] Courts rejecting the historical approach express concern that relying solely on a historical calculation could mean that a debtor who has suffered a recent job loss or otherwise experienced a decrease in income may no longer be able to pay the amount required by the schedule B22C.[159] Debtors unfortunate enough to find themselves in this position may subsequently find themselves locked into a plan that is "doomed to fail."[160] Conversely, a debtor who anticipates a significant increase in future income has incentive to file quickly in order to shield that income from the chapter 13 plan.[161] Thus, the debtor would receive a windfall, while unsecured creditors would be cheated out of payments the debtor is actually able to make.[162] This result directly contradicts clear congressional intent to force can-pay debtors to repay more of their unsecured debts.[163]

Courts that have adopted the historical approach defend against this criticism by claiming that any undesirable results must have been anticipated by Congress, and it is not up to the courts to alter the meaning of the Code to avoid such results.[164] Therefore, the clear meaning of § 1325(b)(2) requires that any post-filing changes to a debtor's income are irrelevant to the calculation of projected disposable income, and bankruptcy courts may not consider such changes when confirming a chapter 13 plan.[165] These courts have suggested other methods by which a debtor might account for a change of circumstances without violating the historical income calculation requirement of § 1325(b)(2). Still, these proposed "solutions" are also potentially problematic.

First, the *Kagenveama* court stated that a plan could be modified under § 1329 after confirmation of the plan if the debtor's actual income ended up being different than the calculated amount.[166] A chapter 13 plan may be modified at the request of the debtor, the trustee, or an unsecured creditor in order to increase or decrease the plan payments at any time after confirmation of the plan.[167] The modification provision in

158. *Hardacre*, 338 B.R. at 722.

159. *See, e.g.*, *id.*

160. *In re* Hughey, 380 B.R. 102, 106 (Bankr. S.D. Fla. 2007).

161. *Hardacre*, 338 B.R. at 722.

162. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 314 (B.A.P. 1st Cir. 2007).

163. *See* Frost, *supra* note 78, at 6; *see also* Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 41 WEEKLY COMP. PRES. DOC. 641 (Apr. 20, 2005).

164. *See, e.g.*, *In re* Greer, 388 B.R. 889, 892 (Bankr. C.D. Ill. 2008) (stating that, even though it may not be clear why Congress chose to change the definition of disposable income, it nonetheless did so); Mancl v. Chatterton (*In re* Mancl), 381 B.R. 537, 542 (Bankr. W.D. Wis. 2008) (noting that it was entirely predictable that some debtors' actual income would be different from the six-month average, but that "is certainly not a justification for ignoring the detailed parameters of § 1325(b)").

165. *Greer*, 388 B.R. at 895.

166. *See* Maney v. Kagenveama (*In re* Kagenveama), 527 F.3d 990, 997, 999 (9th Cir. 2008), *amended by* 541 F.3d 868 (9th Cir. 2008).

167. 11 U.S.C. § 1329(a) (2006).

§ 1329, however, was not intended to address issues that were known at the time the plan was confirmed.[168] Rather, modification under § 1329 is "limited to matters that arise post-confirmation."[169] This suggests that courts should take into consideration all matters known at the time of confirmation when creating a repayment plan, rather than confirming a concededly infeasible plan and dealing with the problems it raises at a later date. Furthermore, the Ninth Circuit in *Kagenveama* suggests that the *trustee* may seek modification if the debtor's income increases.[170] But does the debtor have the same option if his income decreases? The Ninth Circuit does not say. The Ninth Circuit likely did not propose this solution for debtors because it was aware that a concededly infeasible plan is not confirmable in the first place.[171] A chapter 13 plan cannot be confirmed by the bankruptcy court unless the debtor is actually capable of making the proposed payments for the applicable term of the plan.[172] A plan that cannot be confirmed due to infeasibility cannot be modified post-confirmation.[173] Therefore, it appears that this "solution" is not available to a debtor who has suffered a loss of income immediately preceding or following the petition date.

Second, it has been suggested by at least one court that a debtor who experiences a substantial change in circumstances after filing the petition may avoid an infeasible plan payment by dismissing his chapter 13 case and refiling when the prior six-month average will better reflect his actual ability to repay.[174] This solution, however, may have implications that would affect the debtor's treatment under other sections of the Code. A bankruptcy filing instantly puts into effect an automatic stay of collection activities that prevents creditors from attempting to collect debts incurred prior to filing the bankruptcy petition.[175] The automatic stay protects the debtor from harassment by creditors during pendency of the plan, and also serves to protect creditors as a group by preventing an individual creditor from depleting all of a debtor's assets through its collection efforts, leaving nothing for other unsecured creditors.[176] But the Code contains a provision that limits the effect of the automatic stay for debtors who have had a case pending under chapters 7, 11, or 13 dis-

168. *See* Storey v. Pees (*In re* Storey), 392 B.R. 266, 272 (B.A.P. 6th Cir. 2008); *In re* Solis, 172 B.R. 530, 532 (Bankr. S.D.N.Y. 1994).

169. *Storey*, 392 B.R. at 272.

170. *See Kagenveama*, 527 F.3d at 997.

171. 11 U.S.C. § 1325(a)(6) (providing that a chapter 13 plan may only be confirmed if "the debtor will be able to make all payments under the plan and to comply with the plan").

172. *Id.*

173. *See id.* § 1329(a) (stating that a chapter 13 plan may be modified "[a]t any time *after* confirmation of the plan." (emphasis added)).

174. *In re* Greer, 388 B.R. 889, 895–96 (Bankr. C.D. Ill. 2008).

175. 11 U.S.C. § 362(a).

176. TABB, *supra* note 5, at 244.

missed within the one-year period preceding the second filing.[177] Though this provision contains a "good faith" exception,[178] it could potentially have detrimental results for debtors who attempt to dismiss and refile to compensate for a substantial change in circumstances.

The historical approach clearly disregards the future-oriented implications of "projected" disposable income, as well as other language in § 1325(b) that instructs courts to consider the income a debtor will actually receive during the plan repayment period. Furthermore, it applies the language of the statute in a manner that will lead to clearly absurd and undesirable results, and courts propose only unsatisfactory remedies for such results. For these reasons, the historical approach is unworkable and should be rejected.

### *B. The Rebuttable Presumption: Schedule B22C Is a "Starting Point"*

Under this approach, "disposable income" is only *presumed* to be the same as "projected disposable income."[179] The courts that hold that the § 1325(b)(2) definition of disposable income creates merely a rebuttable presumption rely on the definition of "projected" as a "future-oriented" term.[180] The courts reason that "[c]ommon sense dictates that the use of the word 'projected' should be interpreted to mean what it is, i.e., a best guess as to what the future holds."[181] Courts adopting the rebuttable presumption look at the current monthly income calculation based on § 101(10A) and included in schedule B22C as merely a "starting point" for calculating a debtor's actual projected income.[182] A debtor can then adjust this figure up or down by showing an adjustment of either income or expenses is necessary to account for a "substantial change in circumstances."[183] A creditor or the bankruptcy trustee may also request a deviation from the schedule B22C calculations by making such a showing.[184] This approach requires courts to determine whether current monthly income as a historical average accurately depicts the debtor's actual income during the course of the plan.[185]

---

177. 11 U.S.C. § 362(c)(3). This provision does contain an exception for debtors who had a chapter 7 case dismissed under the means test of § 707(b)—those debtors remain free to file a chapter 13 plan immediately without being subjected to a limited stay. *Id.*

178. *Id.* § 362(c)(3)(B).

179. *See* Becket & McNeal, *supra* note 8, at 20.

180. *See, e.g.*, *In re* Jass, 340 B.R. 411, 415 (Bankr. D. Utah 2006).

181. eCast Settlement Corp. v. May (*In re* May), 381 B.R. 498, 506 (Bankr. W.D. Pa. 2008).

182. Hamilton v. Lanning (*In re* Lanning), 545 B.R. 1269, 1278, 1282 (B.A.P. 10th Cir. 2007), *aff'd*, 545 F.3d 1269 (10th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3449 (U.S. Nov. 2, 2009) (No. 08-998); *Jass*, 340 B.R. at 418.

183. *Jass*, 340 B.R. at 418; *see also Lanning*, 545 B.R. at 1278 (requiring showing of "special circumstances" to adjust current monthly income calculation).

184. *May*, 381 B.R. at 507 (citing *In re* Briscoe, 374 B.R. 1, 19 (Bankr. D. Colo. 2007)).

185. *In re* Gonzalez, 388 B.R. 292, 300 (Bankr. S.D. Tex. 2008).

This theory is espoused in *In re Jass*, decided by the Bankruptcy Court for the District of Utah in 2006.[186] In *Jass*, the B22C form filed by the debtors showed their disposable income as $3625.63 per month, yet they had proposed to pay only $790.00 to their unsecured creditors.[187] The debtors argued that anticipated medical bills due to an ongoing medical condition would significantly reduce the disposable income they would have to contribute toward the plan in the future, and so the schedule B22C calculation was not an accurate reflection of their ability to contribute to the plan.[188] They therefore argued that BAPCPA did not require them to pay the amount calculated by the schedule B22C so long as they could show that the amount on the form was not a true representation of their future income.[189] In other words, the current monthly income calculation could simply be ignored if the debtor's actual "projected" income would be significantly different.[190] The trustee, however, argued that the schedule B22C calculation of disposable income was controlling, and therefore the plan could not be confirmed unless it provided that the debtors pay the full $3625.63 to the plan.[191]

The *Jass* court adopted the debtor's interpretation, concluding that § 1325(b)(2) defines only "disposable income," whereas §1325(b)(1) requires that "*projected* disposable income" be applied to unsecured creditors.[192] Forcing debtors to pay the amount on the B22C form, reasoned the court, "would essentially ignore the word 'projected' and give meaning only to the term 'disposable income.'"[193] Therefore, the court declared that the "clear and unambiguous" meaning of the statute was that the figure that resulted from the schedule B22C calculations was merely a starting point for determining actual projected disposable income.[194]

Several courts have adopted this interpretation of projected disposable income.[195] These courts have expressed concern that forcing debtors to comply with a definition of disposable income based on past income would make the plan infeasible in cases where the bankruptcy filing was prompted by a sudden change in circumstances.[196] When circumstances suggest that the current monthly income calculation according to sched-

186. 340 B.R. 411.
187. *Id.* at 414.
188. *Id.*
189. *Id.*
190. *Id.* at 415.
191. *Id.* at 414.
192. *See id.* at 416–17 (emphasis added) (internal quotation marks omitted).
193. *Id.* at 416.
194. *Id.* at 415.
195. *See, e.g.*, Hamilton v. Lanning (*In re* Lanning), 380 B.R. 17, 24–25 (B.A.P. 10th Cir. 2007), *aff'd*, 545 F.3d 1269 (10th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3449 (U.S. Nov. 2, 2009) (No. 08-998); *In re* DeThample, 390 B.R. 716, 725 (Bankr. D. Kan. 2008).
196. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 312 (B.A.P. 1st Cir. 2007) (noting that strict adherence to the historical calculation of current monthly income "assumes, without justification, that a debtor's circumstances will not change after the date of case commencement or during the plan commitment period" and that "[l]ife informs otherwise"); *Jass*, 340 B.R. at 417.

ule B22C simply does not accurately reflect the debtor's ability to pay under the plan, such circumstances cannot be ignored.[197] Under this view, requiring the debtor to continue to pay based on income they no longer have would deny those debtors the "fresh start" that the Code guarantees.[198]

Under the rule proposed by *Jass* and its progeny, disposable income as calculated by the current monthly income figure contained in the schedule B22C creates a presumption of disposable income that is subject to rebuttal if the debtor can show a substantial change in circumstances "such that the numbers contained in Form B22C are not commensurate with a fair projection of the debtor's budget in the future."[199] There is, however, a heavy burden on the party seeking adjustment under the *Jass* rule to present specific evidence explaining why the disposable income as calculated by schedule B22C does not comport with the debtor's actual projected disposable income.[200] Generally, courts that adopt this approach have held that the standard of proof required to rebut the presumption of abuse under the means test of § 707(b)(2)(B) applies to rebut a presumption of disposable income under § 1325(b)(2).[201] At least one court, however, has imposed a mere preponderance of the evidence standard.[202]

The primary problem with the *Jass* approach is the glaring absence of explicit language in § 1325(b) creating a rebuttable presumption of any kind.[203] This is especially problematic because there are other places in the Code where Congress not only explicitly created a rebuttable presumption, but also specified how a party may rebut such a presumption.[204] Therefore, opponents of this approach claim that the lack of any clear language in § 1325(b) indicates that Congress intended no such presumption in § 1325(b).[205] *Jass* itself does not address this concern. The Tenth Circuit, however, explained this apparent incongruity by stressing

197. *DeThample*, 390 B.R. at 723.

198. *Jass*, 340 B.R. at 417.

199. *Id.* at 418.

200. *See id.* at 419.

201. *See, e.g.*, Hamilton v. Lanning (*In re* Lanning), 380 B.R. 17, 25 (B.A.P. 10th Cir. 2007), *aff'd*, 545 F.3d 1269 (10th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3449 (U.S. Nov. 2, 2009) (No. 08-998). The means test requires that, in order to rebut a presumption of abuse, a debtor must provide documentation detailing the increase in expenses or changes to their income, provide a detailed explanation of the special circumstances that they claim rebut the presumption, and swear under oath to the accuracy of the information. 11 U.S.C. § 707(b)(2)(B) (2006).

202. eCast Settlement Corp. v. May (*In re* May), 381 B.R. 498, 507 (Bankr. W.D. Pa. 2008).

203. *See, e.g.*, Maney v. Kagenveama (*In re* Kagenveama), 527 F.3d 990, 996 (9th Cir. 2008), *amended by* 541 F.3d 868 (9th Cir. 2008); *In re* Greer, 388 B.R. 889, 893 (Bankr. C.D. Ill. 2008); *see also* Frost, *supra* note 78, at 4.

204. *See, e.g.*, 11 U.S.C. § 524(m) (creating a presumption of undue hardship and specifying how such presumption may be rebutted); *id.* § 707(b)(2) (creating a presumption of abuse using the means test and specifying how such presumption may be rebutted); *see also* Frost, *supra* note 78, at 4.

205. *See, e.g.*, *Kagenveama*, 527 F.3d at 997 ("Congress could have included a presumption in § 1325(b)(1)–(2), but it did not."). The Ninth Circuit also noted that courts must presume that Congress acts purposely when it omits language, just as when it includes language. *Id.*

the importance of giving meaning to the language that Congress *did* include in the statute; in particular, the language indicating a forward-looking interpretation in § 1325(b)(1).[206] The court reasoned that giving proper consideration to the forward-looking text of the statutory language should "outweigh the concern about implying a presumption."[207]

Additionally, creating a presumptive view of disposable income grants bankruptcy judges an expansive amount of discretion in determining what facts may rebut such a presumption and what income or expense calculation would replace the schedule B22C calculation once the presumption has been rebutted.[208] Yet it is clear that one of the primary goals of the amendments to the consumer provisions of the Bankruptcy Code under BAPCPA was to eliminate a perceived abuse of the system by reducing the amount of judicial discretion in determining plan payments, especially for above-median debtors.[209] Therefore, because the rebuttable presumption fails to adhere to the plain language of the statute and instead expands judicial discretion where it should be limited, this interpretation of projected disposable income must also be rejected.

### *C. The "Hybrid" Approach*

Some courts have adopted a "hybrid approach" that avoids many of the problems of the previous two approaches by giving full consideration to the future-oriented language of § 1325(b) while also giving meaning to the reference to current monthly income in § 1325(b)(2).[210] The hybrid approach also avoids forcing a debtor into an infeasible plan or permitting a debtor to receive a windfall, and it does so without creating presumptions where there are none.[211]

Under the hybrid approach, disposable income is inherently different from projected disposable income.[212] The fact that "projected disposable income" is referenced in § 1326(b)(1), but only "disposable income" is defined in § 1325(b)(2) indicates that Congress clearly intended the two terms to be distinct from one another.[213] Like *Jass* and its progeny, the hybrid approach focuses on a textual analysis of the language in § 1325(b) and concludes that "projected" refers to the income a debtor actually expects to receive during the plan term, not a mere multiplier of

206. *Lanning*, 545 F.3d at 1279.

207. *Id.*

208. *In re* Johnson, 400 B.R. 639, 648 (Bankr. N.D. Ill. 2009).

209. Coop v. Frederickson (*In re* Frederickson), 545 F.3d 652, 658 (8th Cir. 2008); *see also* Frost, *supra* note 78, at 6.

210. *See Johnson*, 400 B.R. at 649–50.

211. *See id.* at 650.

212. *See In re* Hardacre, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006); *see also* Becket & McNeal, *supra* note 8, at 20–21.

213. *Hardacre*, 338 B.R. at 723 ("While Congress could have used the phrase 'disposable income' in section 1325(b)(1)(B) and thereby invoked its definition as set forth in section 1325(b)(2), it chose not to do so. Consequently, Congress must have intended 'projected disposable income' to be different than 'disposable income.'").

the debtor's income from the prior six months.[214] Rather than creating a rebuttable presumption that the six-month calculation of disposable income is an accurate reflection of actual income, the hybrid approach holds that the calculation of projected disposable income necessarily includes a consideration of anticipated income.[215] Under this approach, a forward-looking calculation of disposable income is necessary to avoid anomalous results in cases where a debtor suffers a drastic change in circumstances in the months preceding the petition date.[216]

The most frequently cited decision adopting this position is *In re Hardacre*,[217] decided by the Bankruptcy Court for the Northern District of Texas in 2006. In fact, *Hardacre* was one of the first decisions to tackle the meaning of "projected disposable income" following the BAPCPA amendments.[218] In reaching its determination that a disposable income calculation necessarily looks to a debtor's anticipated income, the *Hardacre* court focused not only on the word "projected," but also on the phrase in § 1325(b)(1)(B) requiring income "*to be received*" during the plan period be applied to unsecured creditors.[219] According to the court, this language clearly indicates a forward-looking calculation in which "projected disposable income" is the income "actually to be received by the debtor during the commitment period."[220] The commitment period begins when the first payment is made to the plan,[221] whereas the current monthly income calculation of "disposable income" is based on the debtor's circumstances in the six months preceding filing of the petition.[222] Therefore, "projected disposable income" cannot indicate a calculation of prepetition income because such an interpretation would render the terms "projected" and "to be received" found in § 1325(b)(2)(B) "superfluous."[223] Additionally, § 1325(b)(1) instructs that a plan may not be confirmed unless the debtor contributes all projected disposable income "as of the effective date of the plan."[224] The *Hardacre* court and its progeny interpret this language as further indication that only the debtor's actual income as of the confirmation date is relevant to the calculation of projected disposable income.[225]

Not that the current monthly income calculation required by § 1325(b)(2) is irrelevant. Rather, the hybrid approach holds that the current monthly income calculation in § 101(10A) is necessary to deter-

214. *See, e.g.*, *id.* at 722–23; *see also* Becket & McNeal, *supra* note 8, at 20–21.
215. *See, e.g.*, *In re* Hughey, 380 B.R. 102, 105 (Bankr. S.D. Fla. 2007); *In re* Demonica, 345 B.R. 895, 900 (Bankr. N.D. Ill. 2006); *Hardacre*, 338 B.R. at 722.
216. *Hughey*, 380 B.R. at 106; *Hardacre*, 338 B.R. at 722; Becket & McNeal, *supra* note 8, at 21.
217. 338 B.R. 718.
218. Becket & McNeal, *supra* note 8, at 20.
219. 11 U.S.C. § 1325(b)(1)(B) (2006) (emphasis added); *Hardacre*, 338 B.R. at 723.
220. *Hardacre*, 338 B.R. at 723.
221. 11 U.S.C. § 1325(b)(1)(B).
222. *Id.* § 101(10A).
223. *Hardacre*, 338 B.R. at 723.
224. 11 U.S.C. § 1325(b)(1).
225. *Hardacre*, 338 B.R. at 723.

mine which sources of income may be considered in the calculation of projected disposable income.[226] For example, § 101(10A) excludes benefits paid under the Social Security Act.[227] Therefore, under this approach it would be inappropriate to consider any anticipated Social Security income in calculating a debtor's projected monthly income.[228] This approach results in a "synthesis of §§ 101(10A) and 1325(b)" by giving meaning to apparently conflicting provisions of the Code.[229] It honors the instruction to look to § 101(10A) in calculating disposable income—thus carrying out congressional intent to limit discretion by clearly defining what sources of income a court may consider—while still giving full meaning to the forward-looking language found throughout § 1325(b).[230]

The primary criticism of the hybrid approach is that its forward-looking nature fails to give proper consideration to the changes imposed by BAPCPA.[231] Specifically, critics say that Congress clearly intended to change the way disposable income is calculated by adding a reference to current monthly income in § 1325(b)(2). By continuing to calculate disposable income based on future circumstances, these courts have ignored the instruction in § 1325(b)(2) to look to current monthly income—a term defined using a historical average—in determining a debtor's projected disposable income.[232] Critics of the hybrid approach argue that this disregard for statutory instruction cannot be permitted simply because courts may prefer a different result than that obtained through strict adherence to the statutory language.[233] The courts making such statements, however, have focused so narrowly on the current monthly income instruction in § 1325(b)(2) that they themselves have disregarded the forward-looking language in the rest of § 1325(b). On its face, § 1325(b)(2) does indeed seem to contemplate a strict application of the historical income calculation in determining projected disposable income. Yet when strictly applied, the historical implications of current monthly income cannot be reconciled with a strict adherence to the forward-looking language contained within the rest of subsection (b).[234] When statutory provisions conflict with each other, a court must give ef-

226. *Id.*

227. 11 U.S.C. § 101(10A)(B).

228. *See In re* Hughey, 380 B.R. 102, 107 (Bankr. S.D. Fla. 2007) (noting that it would be inappropriate to use income "derived from a source that 11 U.S.C. § 101(10A)(B) specifically includes"); *Hardacre*, 338 B.R. at 723 (holding that § 101(10A) is relevant to determine what income may be included in the projected disposable income calculation, as well as what income may not).

229. *In re* Johnson, 400 B.R. 639, 649 (Bankr. N.D. Ill. 2009).

230. *See id.*

231. *See, e.g.*, Maney v. Kagenveama (*In re* Kagenveama), 527 F.3d 990, 996 (9th Cir. 2008), *amended by* 541 F.3d 868 (9th Cir. 2008); *In re* Greer, 388 B.R. 889, 893 (Bankr. C.D. Ill. 2008); *see also* Frost, *supra* note 78, at 3.

232. *See, e.g.*, *Greer*, 388 B.R. at 892–93.

233. *See In re* Alexander, 344 B.R. 742, 747–48 (Bankr. E.D.N.C. 2006).

234. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 312 (B.A.P. 1st Cir. 2007) ("Insofar as the term 'disposable income' demands a look back and the term 'projected' requires a look forward, the language is irreconcilable.").

fect to both provisions to the greatest extent it can.[235] The hybrid approach accomplishes this directive, while also interpreting the language in a manner that comports with the congressional intent of the BAPCPA amendments.

## IV. RESOLUTION

The majority of bankruptcy courts that have addressed the issue of projected disposable income have adopted a forward-looking calculation, whether it be the rebuttable presumption advocated by *Jass* or the hybrid approach introduced by *Hardacre*.[236] Likewise, four of the five Courts of Appeals that have addressed the issue have ruled in favor of a forward-looking approach.[237] It is true that the rebuttable presumption may ultimately achieve the same results as the hybrid approach, as both allow for a deviation from the strict historical calculation of current monthly income. But it does so by creating a presumption where none exists.[238] The hybrid approach, on the other hand, gives meaning to all parts of the statutory provision and comports with congressional intent without adding language to the statute. For this reason, it is clear that, of the three approaches taken by courts in interpreting the meaning of projected disposable income under § 1325(b), the hybrid approach provides the most workable interpretation of the provisions in § 1325(b).

Congress appears to have had two primary goals in amending the consumer provisions of the Code: to require debtors (particularly above-median debtors) to repay a larger portion of their debt, and to reduce the amount of discretion bankruptcy judges exercised in confirming consumer bankruptcy cases.[239] These two goals, however, may ultimately conflict

235. *Johnson*, 400 B.R. at 649 (citing Morton v. Mancari, 417 U.S. 535, 550 (1974)); *see also Kibbe*, 361 B.R. at 312 (stating that when terms are irreconcilable, "[o]ne must give way to the other, or the courts must fashion an interpretation that gives the greatest meaning to both").

236. *See, e.g.*, *In re* Gonzalez, 388 B.R. 292, 299 (Bankr. S.D. Tex. 2008); *see also* TABB, *supra* note 5, at 1257; Frost, *supra* note 78, at 3.

237. *See In re* Turner, 574 F.3d 349, 356 (7th Cir. 2009) (holding that, while current monthly income provides a starting point, the final calculation of projected disposable income can consider changes to debtor's financial circumstances); Nowlin v. Peake (*In re* Nowlin), 576 F.3d 258, 266 (5th Cir. 2009) ("The mechanical projection of the debtor's statutorily defined 'disposable income' serves as the starting point, subject to rebuttal by appropriate evidence of changed circumstances."); Hamilton v. Lanning (*In re* Lanning), 545 F.3d 1269, 1282 (10th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3449 (U.S. Nov. 2, 2009) (No. 08-998) (holding that current monthly income is merely a starting point for determining projected disposable income); Coop v. Frederickson (*In re* Frederickson), 545 F.3d 652, 659 (8th Cir. 2008) (holding that the final calculation of projected disposable income must take into consideration changes in a debtor's circumstances, and in doing so, reversing the Bankruptcy Appellate Panel's adoption of the historical approach). *But see* Maney v. Kagenveama (*In re* Kagenveama), 527 F.3d 990, 994 (9th Cir. 2008), *amended by* 541 F.3d 868 (9th Cir. 2008) (holding that disposable income as defined by the current monthly income calculation is controlling).

238. *See, e.g.*, *Johnson*, 400 B.R. at 648 ("Nothing in § 1325(b) creates or implies a presumption of correctness in the average income from the six months before bankruptcy.").

239. *See* H.R. REP. NO. 109-31, pt. 1, at 47 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 118 (stating that the reforms in BAPCPA were "intended to improve the bankruptcy system by deterring abuse [and] setting enhanced standards for bankruptcy professionals"); *see also* Frost, *supra* note 78, at 6.

as applied to the best efforts test of § 1325(b), simply because applying a formulaic approach to calculating disposable income may limit judicial discretion but simultaneously allow a debtor to escape paying all his actual income to the plan.[240] The hybrid approach balances the statutory language with the legislative intent more effectively than the other two approaches, giving effect to both goals that Congress intended to achieve in amending the Code.

The hybrid approach presents an interpretation that gives meaning to all of the language in § 1325(b). Courts must assume that the language included in a statute is included intentionally and accurately represents the legislative intent of the statute.[241] Where the language of a statute is plain, courts should not alter it but enforce it as written.[242] However, courts must also interpret the statute in a way that will "minimize discord among related provisions."[243] Additionally, there is a presumption against superfluous language, and courts should avoid interpretations that render part of the statute meaningless or ineffective.[244]

The historical approach simply overlooks the language in § 1325(b) that demands a future calculation and indicates that "projected" is more than just a multiplier.[245] Additionally, just as Congress knows how to create a rebuttable presumption, there is evidence that it also knows how to create a multiplier, so the absence of such explicit language in § 1325(b) means that "projected" cannot be just a synonym for "multiplier."[246] Furthermore, the historical approach ignores the fact that it is not historical income the debtor must rely on to repay her debt throughout the applicable commitment period.[247] Rather, a debtor is required to turn over all "*future* earnings or other *future* income" to the trustee for distribution to creditors.[248] But just as it is a mistake to ignore the forward-looking language in the statute, it is also a mistake for courts to ignore the instruction to look to current monthly income as defined by § 101(10A) when calculating disposable income,[249] or to read language into the statute that is simply not there.[250] The hybrid approach avoids both these problems by embracing the forward-looking language, while

240. *See* Frost, *supra* note 78, at 6 ("[L]imiting judicial discretion only works to increase payments by can-pay debtors if the formula is right.").

241. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004).

242. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).

243. Perlman v. Catapult Entm't, Inc. (*In re* Catapult Entm't, Inc.), 165 F.3d 747, 751 (9th Cir. 1999); *see also* Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 312 (B.A.P. 1st Cir. 2007); *Johnson*, 400 B.R. at 649.

244. United States v. Blasius, 397 F.2d 203, 207 n.9 (2d Cir. 1968).

245. *In re* Gonzalez, 388 B.R. 292, 304–05 (Bankr. S.D. Tex. 2008).

246. *In re* Wilson, 397 B.R. 299, 308 (Bankr. M.D.N.C. 2008).

247. *See Gonzalez*, 388 B.R. at 305 ("A test used to make a decision for today can not [sic] be applied in the same way to make a decision for 60 different tomorrows.").

248. 11 U.S.C. § 1322(a)(1) (2006) (emphasis added).

249. *See In re* Demonica, 345 B.R. 895, 900 (Bankr. N.D. Ill. 2006) (holding that the income calculation on the schedule I is controlling and offering no meaning to the current monthly income instruction in § 1325(b)(2)).

250. *See In re* Johnson, 400 B.R. 639, 648 (Bankr. N.D. Ill. 2009).

still giving meaning to the current monthly income provision in a manner that comports with congressional intent.

Second, and possibly most important, the hybrid approach avoids "absurd" results that are presumptively at odds with congressional intent. There is a presumption that Congress does not intend a statute to have absurd results, and courts are not bound to the plain language in cases where absurd results would be compelled by a strict application of the statutory language.[251] Rather, courts must apply the statute in a way that avoids a result "demonstrably at odds with the intentions of its drafters."[252] Because the "plain meaning" interpretation is clearly ambiguous and has led to results that cannot be reconciled, it is also necessary to consider what Congress intended to accomplish by amending § 1325(b) under BAPCPA.

Under the hybrid approach, a debtor's changed circumstances can be dealt with at the time of confirmation, thus preventing a debtor from either being forced to pay an amount she is no longer able to pay, or confirming a plan that allows a debtor to obtain a windfall.[253] The courts that advocate strict adherence to the historical calculation argue that such an interpretation is not absurd simply because it may lead to unfavorable results in some cases.[254] This argument, however, fails to take into account the results when the historical calculation interacts with other parts of the Code. Specifically, the historical approach could potentially make a chapter 13 plan entirely unconfirmable for a debtor whose circumstances have changed significantly since filing.[255] A debtor must be able to make all the payments and comply with the terms of the plan in order to have the plan confirmed.[256] In cases where the debtor's financial circumstances have not changed in the six months preceding or the time period elapsed since filing the petition, the debtor should have no problem confirming a plan, even under the historical approach.[257] But the historical calculation is often going to be a poor indicator of actual ability to pay, especially as more debtors suffer a loss of income due to the continued economic downturn and rising unemployment rates.[258] If debtors are forced to propose a plan based on a historical average that reflects income they no longer have, the feasibility test may prevent the court from

251. Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir. 1996).

252. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc. 458 U.S. 564, 571 (1982)).

253. *See In re* Hardacre, 338 B.R. 718, 722–23 (Bankr. N.D. Tex. 2006).

254. *See, e.g.*, Maney v. Kagenveama (*In re* Kagenveama), 527 F.3d 990, 997 (9th Cir. 2008), *amended by* 541 F.3d 868 (9th Cir. 2008).

255. *See Hardacre*, 338 B.R. at 722 (noting that a debtor who suffers a loss of income after filing the petition would be unable to confirm a plan because she can no longer devote the income required by the historical calculation to the plan).

256. 11 U.S.C. § 1325(a)(6) (2006).

257. *See In re* Greer, 388 B.R. 889, 895 (Bankr. C.D. Ill. 2008).

258. *See In re* Johnson, 400 B.R. 639, 646–47 (Bankr. N.D. Ill. 2009).

confirming that plan.[259] This result is more than simply unfavorable; it potentially bars debtors from bankruptcy entirely, which is certainly an absurd result that is at odds with congressional intent.

For an illustration of the effect of this problem on consumer debtors, imagine that a couple files a joint petition for chapter 13 relief. The couple's current monthly income calculation, according to their average income for the six months preceding the petition, establishes them as above-median debtors and shows $1000 in disposable income available for distribution to unsecured creditors. Shortly after filing, however, one spouse loses her job. Now, based on the couple's *actual* circumstances at the time of confirmation, they can only afford to pay $400 per month, and this is the amount they propose to pay to the plan.[260] Under the historical approach, should the trustee or a creditor object, this plan would be unconfirmable under § 1325(b) because it does not propose to pay the full amount calculated by the schedule B22C.[261] Conversely, should the debtors file an amended plan proposing to pay the full $1000, the plan also could not (or at least should not) be confirmed because it would be infeasible under § 1325(a)(6).[262] The debtors cannot pay to the plan money that they do not have, and therefore they would be unable to comply with the terms of the plan, as required by § 1325(a)(6). The debtors are now in the unfortunate position of being unable to comply with *both* the feasibility test of § 1325(a)(6) *and* the disposable income test of § 1325(b). Therefore, the plan is not confirmable and must be dismissed.[263] This result is not only detrimental to the debtor, but also to the unsecured creditors. If the case is dismissed the unsecured creditors will likely get nothing at all, rather than the $400 per month the debtors were actually able to pay.[264]

Furthermore, because our hypothetical debtors are above the state median income for their family size, and may remain so even with the loss of one spouse's income, the means test also bars them from filing for relief under chapter 7 of the Code.[265] Though Congress most certainly intended to bar above-median debtors with the capacity to repay their

259. *See* eCast Settlement Corp. v. May (*In re* May), 381 B.R. 498, 506–07 (Bankr. W.D. Pa. 2008).

260. The facts of this hypothetical situation are similar to those presented to the bankruptcy court in *In re Greer*. 388 B.R. at 890. In that case, the bankruptcy judge, adopting the historical approach advocated by *Kagenveama*, held that the fact that one of the debtors had lost her job was "simply not relevant to [the disposable income calculation] and may not be considered for plan confirmation purposes." *Id.* at 895.

261. In *Greer*, the plan was indeed not confirmed because the court held it failed to comply with the disposable income requirement of § 1325(b). *Id.* at 896.

262. *See May*, 381 B.R. at 506–07.

263. *See* 11 U.S.C. § 1307(c)(5) (2006) (allowing dismissal of the case if a plan is denied confirmation).

264. *See* Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 314 (B.A.P. 1st Cir. 2007) (noting that if the plan failed "neither the debtor nor the creditors would obtain the benefits that Congress intended for both under chapter 13 of the Bankruptcy Code").

265. *See* 11 U.S.C. § 707(b)(2).

debts from obtaining chapter 7 relief,[266] there is no "obvious support" for the proposition that Congress intended to foreclose such debtors from *all* forms of bankruptcy relief.[267] Such a result would deny a fresh start to many debtors. Given that this fresh start is one of the fundamental purposes of bankruptcy,[268] it could not have been the intent of Congress to withhold this relief from an entire class of debtors.[269]

The courts adopting the historical approach do not provide a satisfactory solution to this problem. As noted, modification is not intended to deal with circumstances that are known at the time of confirmation.[270] Additionally, modification immediately following confirmation would only be available to a debtor who had received, or who anticipated receiving, an increase in income after the petition date.[271] Those debtors who have lost income prior to confirmation do not have the option of a post-confirmation modification under the historical approach because they are unable to propose a feasible plan.[272] If a plan can not be confirmed due to infeasibility, there is no way to modify it post-confirmation.[273] The Ninth Circuit glossed over this problem, suggesting that the *trustee* may seek modification if the debtor received an increase in income but providing no suggestion for a *debtor* who suffered a loss in income prior to confirmation.[274] Nor does dismissal provide an adequate solution, due to the risks it poses to automatic stay protection.[275] This is especially problematic for a debtor who was prompted to file bankruptcy due to a pending home foreclosure.[276] Furthermore, neither of these proposed solutions does much to promote judicial efficiency.[277] Requiring parties to file additional motions or to dismiss and refile a new case takes time and costs the debtor money. Such expenditure of time and cost seems entirely unnecessary when the circumstances are known and can be dealt with at the time of confirmation.

---

266. *See* Tabb & McClelland, *supra* note 57, at 466–67.

267. Hamilton v. Lanning (*In re* Lanning), 545 F.3d 1269, 1281 (10th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3449 (U.S. Nov. 2, 2009) (No. 08-998).

268. *See In re* Almonte, 397 B.R. 659, 667 (Bankr. E.D.N.Y. 2008); *In re* Wilson, 397 B.R. 299, 316 (Bankr. M.D.N.C. 2008).

269. *In re* Grady, 343 B.R. 747, 752 (Bankr. N.D. Ga. 2006).

270. *See* Storey v. Pees (*In re* Storey), 392 B.R. 266, 272 (B.A.P. 6th Cir. 2008); *In re* Solis, 172 B.R. 530, 532 (Bankr. S.D.N.Y. 1994).

271. *In re* Lanning, 545 F.3d at 1281.

272. *Id.* at 1281–82.

273. *Id.*; *see also* 11 U.S.C. § 1329 (2006) (stating that a plan may be modified "[a]t any time *after confirmation*" (emphasis added)).

274. Maney v. Kagenveama (*In re* Kagenveama), 527 F.3d 990, 997 (9th Cir. 2008), *amended by* 541 F.3d 868 (9th Cir. 2008).

275. *See* 11 U.S.C. § 362(c)(3) (2006).

276. *See* TABB, *supra* note 5, at 245, 259 (noting that it is very common for debtors to stop a pending foreclosure by filing bankruptcy and receiving automatic stay protection).

277. The legislative history of BAPCPA seems to indicate that part of Congress' intent in amending the Code was to improve judicial efficiency. *See* H.R. REP. NO. 109-31, pt. 1, at 47 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 118 (stating that one of the primary goals of the amendments was to improve the system by "streamlining case administration").

The hybrid approach avoids this result altogether. Considering a debtor's actual income to be received during the plan period ensures that the debtor can propose a plan that is both feasible and contributes all disposable income to the repayment of creditors.[278] Furthermore, this approach best balances the two goals of Congress in enacting BAPCPA.[279] First, it realistically determines what a debtor is actually able to pay and requires the debtor to pay all of that amount to his creditors.[280] This comports with the congressional intent to ensure that debtors pay the "maximum they can afford" to their unsecured creditors through a chapter 13 plan.[281] This means debtors must pay everything they can afford to pay—no more, no less—into the plan.[282] The hybrid approach achieves this result by preventing debtors from being forced into a repayment plan they realistically cannot afford, as well as preventing debtors from receiving a windfall by keeping income they can afford to pay out of the reach of creditors.

Second, the hybrid approach limits judicial discretion in conformity with congressional intent.[283] A primary concern with the old "best efforts" test was that it defined neither income nor expenses, leading to a great deal of judicial discretion in defining those terms.[284] By using the current monthly income definition in § 101(10A) to determine what may be considered "income" for plan purposes, the hybrid approach offers a solution to this problem while avoiding the absurd results of a literal application of current monthly income.[285] The proposition that the reference to current monthly income in § 1325(b)(2) is an instruction on what sources of income are to be considered is bolstered by the further addition to the Code of § 1325(b)(3), which instructs courts to use the means test of § 707(b)(2) to determine what expenses may be considered in calculating disposable income (in the case of above-median debtors).[286] These two provisions, when taken together, indicate that Congress' intent in adding these definitions was to limit the discretion judges previously exercised in determining what constituted income and what constituted expenses, rather than to force debtors into a plan based on historical income.

Courts adopting the historical approach insist that allowing any consideration of future income results in an exercise of judicial discretion

---

278. *In re* Hughey, 380 B.R. 102, 105 (Bankr. S.D. Fla. 2007).

279. *Cf.* Coop v. Frederickson (*In re* Frederickson), 545 F.3d 652, 657 (8th Cir. 2008) (noting that the historical approach does not comport with congressional intent); *In re* Johnson, 400 B.R. 639, 650 (Bankr. N.D. Ill. 2009) (noting the interpretive difficulties of the historical and presumptive approaches, and adopting the hybrid approach).

280. *In re* Grady, 343 B.R. 747, 751 (N.D. Ga. 2006).

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

282. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 314 (B.A.P. 1st Cir. 2007).

283. *Johnson*, 400 B.R. at 650.

284. *See* Corish & Herbert, *supra* note 80, at 55–56.

285. *See Johnson*, 400 B.R. at 650.

286. 11 U.S.C. § 1325(b)(3) (2006).

that disregards the formulaic definition of current monthly income in § 101(10A).[287] Though there is certainly evidence that Congress intended to limit judicial discretion, there is no evidence it intended to eliminate discretion entirely.[288] Rather, Congress likely intended to limit discretion in order to create more uniformity among the courts, while still allowing the provision to be "malleable to a certain degree" in order to provide for a "realistic" determination of a debtor's disposable income.[289] The hybrid approach allows this outcome while still holding true to the congressional intent to limit judicial discretion.

## V. CONCLUSION

The history of bankruptcy reform leading up to the enactment of BAPCPA in 2005 makes clear that Congress intended to change the way bankruptcy operates for consumer debtors. In the wake of a long period of perceived abuse by debtors, Congress amended the Code to make it more difficult for debtors—particularly those with excess income—to liquidate their debts under chapter 7. Additionally, Congress clearly intended to limit the discretion of bankruptcy judges in determining which debtors had sufficient income to effectively participate in a repayment plan. Unfortunately, the amendments as drafted are ambiguous as to how to apply the statutory language in a manner that achieves these goals, while avoiding absurd and unintended results. At first glance, it appears that the dueling provisions of § 1325(b) cannot be reconciled, although courts have certainly attempted to do so. Of the interpretations offered by courts so far, the hybrid approach adopted by *Hardacre* and its progeny best resolves the conflict between the current monthly income calculation of § 101(10A) and the future-oriented language of § 1325(b)(1). Furthermore, it does so without adding unnecessary language to the statute, and without losing sight of congressional intent to require debtors to repay more of their unsecured debt and reduce judicial discretion in calculating disposable income.

As consumer bankruptcy filings continue to increase in the face of rising unemployment and an unstable economy, the manner in which bankruptcy courts calculate the amount that chapter 13 debtors are required to pay under the best efforts test of § 1325(b) becomes increasingly relevant. Bankruptcy relief promises overburdened debtors a reprieve from collection efforts and a fresh start. But if courts continue to interpret the Code in a manner that has the potential to foreclose honest debtors from bankruptcy relief, this promise may be rendered meaningless for an entire class of debtors. Despite an intent to curb perceived abuses, there is no indication that Congress intended to deny

287. *See, e.g.*, *In re* Greer, 388 B.R. 889, 893–94 (Bankr. C.D. Ill. 2008).
288. *See* eCast Settlement Corp. v. May (*In re* May), 381 B.R. 498, 507 (Bankr. W.D. Pa. 2008).
289. *Id.*

these debtors the fundamental relief that bankruptcy provides. If the true intent of Congress was to force debtors to pay any and all excess income into a repayment plan, then a realistic calculation of what income a debtor reasonably anticipates being able to pay at the time the plan is confirmed is the only way to achieve this goal. As the hybrid approach shows, courts can make such a calculation and still give meaning to disposable income as defined in § 1325(b)(2). Forcing debtors into a plan they cannot confirm because it is based on past income flies in the face of congressional intent and endangers the fundamental principles of bankruptcy to treat creditors fairly and give debtors a fresh start.