

ARTICLE

“PROJECTED DISPOSABLE INCOME”: LEGISLATIVE LUNACY AND JUDICIAL GYRATIONS

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I. INTRODUCTION

The most controversial issue arising in consumer cases under the United States Bankruptcy Code¹ is the interpretation of the term “projected disposable income” in § 1325(b)(1),² which, among other pertinent Code provisions, was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.³ It states:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the [Chapter 13] plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor’s *projected disposable income* to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.⁴

The word “projected” is not defined in the Code, and consequently the meaning of projected disposable income has

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (current version at 11 U.S.C §§101-1532). This also is referred to as “the Bankruptcy Code” throughout the remainder of the Article.

2. 11 U.S.C.A. § 1325(b)(1) (West Supp. 2009).

3. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. This is referred to as “the 2005 Act” or “BAPCPA” throughout the remainder of the Article.

4. 11 U.S.C.A. § 1325(b)(1) (West Supp. 2009) (emphasis added).

been interpreted by five differing judicial approaches. This issue has divided every level of the federal courts: six cases have been decided by, or currently are pending, in the United States Circuit Courts of Appeals,⁵ and the matter is the subject of a petition for certiorari pending in the United States Supreme Court for the October Term 2009.⁶ It is highly probable that the Supreme Court will grant the petition for certiorari in order to provide necessary guidance for bankruptcy attorneys, judges, and trustees.

This Article is the first law review article to analyze all five judicial approaches to projected disposable income. It also will discuss the six cases concerning this issue that have been decided by or are pending in the United States Circuit Courts of Appeals or the Supreme Court. The Article will show that the majority view's starting point approach, which is forward-looking, is the best interpretation based on the language in the relevant provisions of the Code, the legislative history, the United States Supreme Court's canons of statutory interpretation, and post-2005 Act case law. However, the Article will point out that the starting point approach contains one major interpretive defect, which is that it reads a presumption into § 1325(b) that Congress did not expressly or impliedly intend. It also will explain with specificity why the minority view's multiplier approach (also known as the mechanical approach), which is backward-looking, is erroneous and often inconsistent with the intent of Congress. Lastly, it will propose a novel approach, called "the non-presumptive starting point approach," that is based on a Supreme Court canon of statutory interpretation and Congress's express grant of broad power to the bankruptcy court in § 105(a).⁷

In the conclusion, this Article will urge the Supreme Court to grant the petition for certiorari in *Hamilton v. Lanning* and to hold that "the non-presumptive starting point approach" to the

5. *In re Turner*, 574 F.3d 349 (7th Cir. 2009); *Nowlin v. Peake* (*In re Nowlin*), 576 F.3d 258 (5th Cir. 2009); *Maney v. Kagenveama* (*In re Kagenveama*), 541 F.3d 868 (9th Cir. 2008); *In re Johnson*, 400 B.R. 639 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom. Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009); *Coop v. Frederickson* (*In re Frederickson*), 545 F.3d 652 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1630 (2009); *Hamilton v. Lanning* (*In re Lanning*), 545 F.3d 1269 (10th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (U.S. Feb. 3, 2009) (No. 08-998).

6. *Hamilton v. Lanning* (*In re Lanning*), 545 F.3d 1269 (10th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (U.S. Feb. 3, 2009) (No. 08-998). The Supreme Court has invited the Solicitor General "to file a brief in this case expressing the views of the United States." *Hamilton v. Lanning*, 129 S. Ct. 2820 (2009) (mem.).

7. *See* 11 U.S.C. § 105(a) (2006) ("The [bankruptcy] court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

projected disposable income issue is the correct interpretation for the reasons asserted in Part V.

II. BACKGROUND

Two of the primary purposes of the 2005 Act were to prevent abuse of the Bankruptcy Code and “to ensure that debtors repay creditors the maximum they can afford.”⁸ In this regard, the First Circuit Court of Appeals recently stated: “The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (‘BAPCPA’) was enacted in response to an upward trend in consumer bankruptcy filings and concerns that bankruptcy relief was ‘too readily available’ and ‘sometimes used as a first resort, rather than a last resort.’”⁹ More specifically, Senator Charles Grassley, the sponsor of the 2005 Act stated:

What we are trying to do is fix a bankruptcy system that has gone awry, where individuals who have the ability to repay their debts don’t do so, and the rest of us are left holding the bag.

What we have tried to do with this bill is inject some fairness into the system, whereby people who have assets and the ability to repay back their debts go into a chapter 13 repayment plan, and people who do not have any means and no ability to repay go into chapter 7.¹⁰

Prior to the 2005 Act, § 1325(b)(1) required that, if an unsecured creditor objected to confirmation of the Chapter 13 plan, the court could not confirm the plan unless, as of the effective date of the plan, it proposed to pay the objecting creditor the total amount of her allowed claim,¹¹ or “all of the debtor’s projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan [would] be applied to make payments under the plan.”¹²

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

9. *Morse v. Rudler (In re Rudler)*, No. 08-9007, 2009 WL 2385469, at *1 (1st Cir. Aug. 5, 2009) (quoting H.R. REP. NO. 109-31, pt. 1, at 4, *reprinted in* 2005 U.S.C.C.A.N. 88, 90).

10. 151 CONG. REC. S2469 (daily ed. Mar. 10, 2005) (statement of Sen. Grassley).

11. 11 U.S.C. § 1325(b)(1)(A) (2000). Under this provision, if the trustee in the case made the objection, then the plan would also have to propose to pay all of the allowed unsecured claims in full for the court to confirm the plan. *Id.*

12. 11 U.S.C. § 1325(b)(1)(B) (2000). Also, prior to the 2005 Act, § 1325(b)(2) defined “disposable income” as “income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor, including [certain allowable charitable contributions] and . . . if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.” 11 U.S.C. § 1325(b)(2) (2000).

This provision, which was known as the “best efforts test,” was added to § 1325 by the 1984 Bankruptcy Amendments and Federal Judgeship Act to establish the requirements for how much the debtor must pay for the Chapter 13 plan to be confirmed.¹³ By enacting the best efforts test in § 1325(b)(1), it appears that Congress intended that the amount of a debtor’s payments would not be a basis for objection under the good faith requirement for confirmation in § 1325(a)(3).¹⁴

In the 2005 Act, Congress made major changes to § 1325(b). It amended the requirement for confirmation in § 1325(b)(1)(B) to read as follows: “[T]he plan provides that all of the debtor’s projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to *unsecured creditors* under the plan.”¹⁵

It is noteworthy that Congress did not define the term “projected disposable income,” which is the issue addressed by this Article that has divided the federal courts throughout the nation. However, Congress did redefine “disposable income”¹⁶ as the debtor’s current monthly income¹⁷ minus the reasonable and necessary monthly expenses “for the maintenance or support of the debtor or a dependent of the debtor.”¹⁸

13. Pub. L. 98-353, § 317, 98 Stat. 333, 356.

14. 11 U.S.C. § 1325(a)(3) (2006); *see also* 8 COLLIER ON BANKRUPTCY ¶ 1325.08[1] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009) (“The amendment thus clarified that the ‘good faith’ standard of section 1325(a)(3) does not set any minimum amount or percentage of payments that must be made to unsecured creditors . . .”).

15. 11 U.S.C.A. § 1325(b)(1)(B) (West Supp. 2009) (emphasis added); *see also* Ned W. Waxman & Justin H. Rucki, *Chapter 7 Bankruptcy Abuse: Means Testing Is Presumptive, but “Totality” Is Determinative*, 45 HOUS. L. REV. 901, 928 n.137 (2008).

The applicable commitment period is five years if the current monthly income of the debtor and his spouse combined is equal to or more than the applicable state median income. The applicable commitment period is three years if the current monthly income of the debtor and his spouse is less than the applicable state median income. In either case, the applicable commitment period may be less than five years or three years, respectively, [only] if the plan provides full payment of all allowed unsecured claims over a shorter period.” 11 U.S.C.A. § 1325(b)(4) (West Supp. 2008). For purposes of including the debtor’s spouse’s income in current monthly income, only the amount paid by the spouse “on a regular basis for the household expenses of the debtor or the debtor’s dependents” will be included. 11 U.S.C.A. § 101(10A)(B) (West Supp. 2008).

Id.; 8 COLLIER, *supra* note 14, ¶ 1325.08[5][d].

16. 11 U.S.C.A. § 1325(b)(2) (West Supp. 2009).

17. 11 U.S.C.A. § 101(10A) (West Supp. 2009). For the purpose of calculating disposable income, current monthly income does not include payments for child support, foster care, or reasonably necessary disability payments for a dependent child made in accordance with applicable nonbankruptcy law. 11 U.S.C.A. § 1325(b)(2) (West Supp. 2009).

18. 11 U.S.C.A. § 1325(b)(2)(A)(i) (West Supp. 2009). Reasonably necessary expenses also may include those for “a domestic support obligation, that first becomes

“Current monthly income” was one of the new terms added to § 101, and it is defined as “the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6-month period ending on . . . the last day of the calendar month immediately preceding the date of the [bankruptcy petition].”¹⁹

Unfortunately, this statutory definition of current monthly income is backward-looking and, consequently, often does not accurately predict the debtor’s actual current or future income, which is a critical factor concerning the debtor’s ability to repay creditors under a Chapter 13 plan. More specifically, often there will be a substantial decrease or increase in the debtor’s actual future income that is caused, for example, by the debtor losing a job or, conversely, going from being unemployed to obtaining a high-paying job. In either instance, using the debtor’s average monthly income for the six months before bankruptcy as the income component of “disposable income” is likely to significantly distort the income component of disposable income.

The other component of disposable income is the debtor’s reasonably necessary expenses.²⁰ In the case of a debtor whose current monthly income is equal to or less than the applicable state median income,²¹ the law was not changed by the 2005 Act, and the court determines what expenses are reasonable and necessary.²² However, in the case of a debtor whose current monthly income is greater than the applicable state median income,²³ the 2005 Act added a new provision requiring that reasonably necessary expenses “be determined in accordance with” the means test standards of § 707(b)(2)(A) and (B).²⁴ These

payable after the date the petition is filed”; certain allowable charitable contributions; and expenses necessary to continue, preserve, and operate the business of a “debtor engaged in business.” 11 U.S.C.A. § 1325(b)(2)(A)(i), (ii), (B) (West Supp. 2009); *see also* 11 U.S.C. § 548(d)(3)–(4) (2006) (defining allowable charitable contributions). A debtor engaged in business is defined as a “debtor that is self-employed and incurs trade credit in the production of income from such employment.” 11 U.S.C. § 1304(a) (2006).

19. 11 U.S.C.A. § 101(10A)(A)(i) (West Supp. 2009). However, social security benefits, payments to victims of war crimes or crimes against humanity, and payments to victims of domestic or international terrorism are excluded from current monthly income. 11 U.S.C.A. § 101(10A)(B) (West Supp. 2009). This Article also will discuss 11 U.S.C. § (10A)(A)(ii), which gives the court discretion to alter the 6-month period under certain circumstances. *See infra* Part III.E.

20. 11 U.S.C.A. § 1325(b)(2) (West Supp. 2009).

21. Hereinafter referred to, for this purpose, as a “below-median debtor.”

22. 11 U.S.C.A. § 1325(b)(2) (West Supp. 2009).

23. Hereinafter referred to, for this purpose, as an “above-median debtor.”

24. 11 U.S.C.A. § 1325(b)(3) (West Supp. 2009); 11 U.S.C.A. § 707(b)(2)(A)–(B) (West Supp. 2009).

means test expenses have been summarized in an earlier law review article as follows:²⁵

Among the allowable expenses are “the total of all amounts scheduled as contractually due to secured creditors” for each of the sixty months after the date of the petition (i.e., the total divided by sixty).^[26] Also deductible are “[t]he debtor’s expenses for payment of all priority claims . . . divided by sixty.”^[27] In addition, the debtor is allowed to deduct certain applicable necessary monthly expenses specified by the Internal Revenue Service (IRS) in tables based on the number of persons per family and gross monthly income. These include necessary expenses under the National Standards that are uniform throughout the country (except for Alaska and Hawaii) for food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous expenses.^[28] Also, the IRS provides Local Standards that allow expenses for transportation costs, and housing and utilities costs.^[29] Finally, certain other actual and necessary monthly expenses specified by the IRS and/or the statute itself may be deducted, including, for example, healthcare and health insurance, childcare, life insurance, telephone services, student loans and certain educational expenses, accounting and legal fees, and reasonably necessary expenses to

25. Waxman & Rucki, *supra* note 15, at 905–06.

26. 11 U.S.C.A. § 707(b)(2)(A)(iii)(I) (West Supp. 2009).

There is a split of authority concerning the application of this provision in Chapter 7 cases. The majority view holds that, even if the debtor intends to surrender the collateral to the secured creditor or has surrendered it, the amounts scheduled as contractually due as of the date of the petition are deductible from current monthly income. *See, e.g., In re Kelvie*, 372 B.R. 56, 64 (Bankr. D. Idaho 2007); *In re Haar*, 360 B.R. 759, 768 (Bankr. N.D. Ohio 2007); *In re Nockerts*, 357 B.R. 497, 504–05 (Bankr. E.D. Wis. 2006); *In re Walker*, No. 05-15010-WHD, 2006 WL 1314125, at *8 (Bankr. N.D. Ga. May 1, 2006). Other courts have held that a debtor who has surrendered the collateral or intends to surrender the collateral will be denied this deduction. *See, e.g., In re Ray*, 362 B.R. 680, 685–86 (Bankr. D.S.C. 2007); *In re Singletary*, 354 B.R. 455, 473 (Bankr. S.D. Tex 2006); *In re Harris*, 353 B.R. 304, 309–10 (Bankr. E.D. Okla. 2006).

Waxman & Rucki, *supra* note 15, at 905 n.19.

27. 11 U.S.C.A. § 707(b)(2)(A)(iv) (West Supp. 2009).

28. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I) (West Supp. 2009); *see also* Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 253–55 & nn.50 & 56 (2005) (discussing the IRS’s National Standards for expenses and the applicable tables, and referring with specificity to the IRS’s Financial Analysis Handbook in the Internal Revenue Manual and the applicable website, as well as the website for the IRS tables).

29. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I) (West Supp. 2009); *see also* Wedoff, *supra* note 28, at 255–61.

maintain the safety of the debtor and her family from violence.^{30]}

It is important to understand that the purpose of the means test is to ascertain whether there is a rebuttable presumption that the granting of relief in a Chapter 7 case (i.e., granting the debtor a discharge) constitutes an abuse of Chapter 7. The means test is a snapshot at the moment of bankruptcy of the debtor's current monthly income and allowable means test expenses, which do not necessarily constitute an accurate predictor of the debtor's actual current or future expenses. However, Congress has incorporated the means test expenses into the calculation of disposable income for above-median debtors,³¹ and because these expenses are backward-looking, they often fail to present an accurate depiction of a debtor's ability to repay creditors under a Chapter 13 plan.

For example, one of the means test expenses is for "all amounts *scheduled* as contractually due to secured creditors in each month of the 60 months following the date of the [bankruptcy] petition."³² This Article agrees with the majority view that, for the purpose of the means test presumption of abuse in a Chapter 7 case, these expenses are deductible "even if the debtor intends to surrender the collateral to the secured creditor or has surrendered it."³³ However, in a Chapter 13 case in which the debtor has surrendered or intends to surrender the collateral (for example, a home) to the secured creditor, it would be absurd to allow a deduction of the home mortgage payments for the purpose of determining disposable income because the expense is neither reasonable nor necessary and such payments will never "be expended." They are nonexistent!³⁴

30. 11 U.S.C.A. § 707(b)(2)(A)(ii) (West Supp. 2009); *see also* Wedoff, *supra* note 28, at 261–72.

31. 11 U.S.C.A. § 1325(b)(3) (West Supp. 2009).

32. 11 U.S.C.A. § 707(b)(2)(A)(iii)(I) (West Supp. 2009) (emphasis added); *see also supra* note 26.

33. Waxman & Rucki, *supra* note 15, at 905 & n.19.

34. 11 U.S.C.A. § 1325(b)(2) (West Supp. 2009); *see also In re Turner*, 574 F.3d 349, 356 (7th Cir. 2009) (disallowing the deduction, and referring to it as "a phantom deduction to reduce the recovery by . . . [the debtor's] unsecured creditors without benefiting any other creditor"); *infra* text accompanying note 139; *In re Vernon*, 385 B.R. 342, 347 (Bankr. M.D. Fla. 2008), *aff'd*, No. 2:08-cv-280, (M.D. Fla. Aug. 3, 2009) (citations omitted) (denying a deduction for secured debt payments on surrendered property, and explaining the different policy goals of applying the means test as a presumption of abuse in Chapter 7 versus using the means test deductions in Chapter 13 "to determine the maximum a debtor could pay under a Chapter 13 plan. . . . If Congress intended to create a means test as a blunt measure of ability to pay without regard to a Chapter 13 plan, that would lead to results that are illogical and sometimes produce a strange result." (citations omitted)); *In re Spurgeon*, 378 B.R. 197, 201 (Bankr. E.D. Tenn. 2007) ("Most courts have not

In this regard, it is noteworthy that Senator Charles Grassley, the sponsor of the 2005 Act, stated the following in a United States Senate hearing:

[T]he federal courts produced a bankruptcy form [22C] that is supposed to measure repayment ability. But it's my understanding that this form actually directs consumers to claim deductions for expenses a debtor may not even have. That certainly wasn't the intent of the law. The form legitimizes gaming of the law, reduces the integrity of the system, and ultimately undermines the reforms we were trying to accomplish.³⁵

Having discussed the calculation of the defined term “disposable income,”³⁶ this Article will proceed next to explain the five judicial approaches to “projected disposable income.”³⁷ In understanding these approaches, it is helpful to be mindful of the reasons causing this split of judicial authority. First, projected disposable income is not defined in the Bankruptcy Code. Second, the two components of disposable income—current monthly income³⁸ minus the means test expenses (for an above-median debtor)³⁹—often are not accurate predictors of the debtor's actual future income or expenses during the applicable commitment period. Third, “the language [of § 1325(b)] is irreconcilable” because “disposable income” looks backward and “projected” looks forward.⁴⁰

allowed the deduction in chapter 13 cases when the proposed plan provided for surrender of the collateral.”). The *Spurgeon* court further stated:

The Court concludes that projecting disposable income allows the court to apply the deduction statute on the basis of events in the chapter 13 case and the terms of the proposed plan. Specifically, the order lifting the stay and the plan provision for surrender of the mobile home mean that the deduction should not include the post-filing installment payments to . . . [the secured creditor] that were called for by the contract.

Id. at 206.

35. Prepared Statement of Senator Chuck Grassley, Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act (Dec. 7, 2006), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=9560.

36. 11 U.S.C.A. § 1325(b)(2)–(3) (West Supp. 2009).

37. 11 U.S.C.A. § 1325(b)(1)(B) (West Supp. 2009).

38. 11 U.S.C.A. § 101(10A)(A)(i) (West Supp. 2009). This provision defines current monthly income as “the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6-month period ending on the last day of the calendar month immediately proceeding the date of the [bankruptcy petition].” *Id.*

39. 11 U.S.C.A. § 1325(b)(3) (West Supp. 2009).

40. *Kibbe v. Sumski* (*In re Kibbe*), 361 B.R. 302, 312 (B.A.P. 1st Cir. 2007) (“One must give way to the other, or the courts must fashion an interpretation that gives the greatest meaning to both.”).

III. JUDICIAL APPROACHES TO “PROJECTED DISPOSABLE INCOME”

The five differing approaches that federal courts throughout the nation have utilized in interpreting what Congress intended by projected disposable income in § 1325(b)(1)(B) are as follows: (1) the starting point approach; (2) the mechanical/multiplier approach; (3) the I and J approach;⁴¹ (4) the harmonizing approach; and (5) excusal from filing Schedule I and resetting the 6-month period to determine current monthly income.⁴²

For the reader's convenience, § 1325(b)(1) states:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the [Chapter 13] plan, then the court may not approve the plan unless, as of the effective date of the plan—(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B) the plan provides that all of the debtor's *projected disposable income* to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.⁴³

A. *The “Starting Point” Approach*

The starting point approach, which is the *majority* view, uses current monthly income (the average monthly income for the six months before bankruptcy) and, for an above-median debtor, the allowable means test expenses on Form 22C as a starting point only, but it adjusts for substantial increases or decreases in the debtor's actual income or expenses when the amount of disposable income on Form 22C “does not adequately represent the debtor's budget projected into the future.”⁴⁴ This approach recently was applied by the Fifth Circuit Court of

41. “I and J” refer to Bankruptcy Schedules I (current income) and J (current expenditures) of an individual debtor.

42. 11 U.S.C.A. § 101(10A)(A)(ii) (West Supp. 2009).

43. 11 U.S.C.A. § 1325(b)(1) (West Supp. 2009) (emphasis added).

44. *See In re Jass*, 340 B.R. 411, 415–16 (Bankr. D. Utah 2006). Official Bankruptcy Form 22C states that it “must be completed by every individual Chapter 13 debtor.” Form 22C is entitled “Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13).” It also has been referred to as the “means test” form. *In re Johnson*, 400 B.R. 639, 641 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom. Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009). The required Schedules I and J, on the other hand, show the debtor's actual current income and expenses, respectively, although Schedule I does not exclude social security benefits, etc., as required by 11 U.S.C.A. § 101(10A)(B) (West Supp. 2009). *See infra* note 80.

Appeals, which held that “a debtor’s ‘disposable income’ calculated under § 1325(b)(2) and multiplied by the applicable commitment period is *presumptively* the debtor’s ‘projected disposable income’ under § 1325(b)(1)(B), but that any party may rebut this *presumption* by presenting evidence of present or reasonably certain future events that substantially change the debtor’s financial situation.”⁴⁵

Thus the starting point approach is a *forward-looking* approach, and it is supported by the language of § 1325(b)(1)(B) and other pertinent provisions of the Bankruptcy Code. Unlike the mechanical/multiplier approach,⁴⁶ which is backward-looking because it merely multiplies disposable income (determined by subtracting the means test expenses from current monthly income even when these numbers are not accurate predictors) over the applicable commitment period, the starting point approach uses the debtor’s actual income and expenses when there have been significant changes. This method of interpretation ascribes meaning to the word “projected”⁴⁷ that the mechanical approach does not. Thus, the Eighth Circuit Court of Appeals recently explained that “a distinction can be drawn between a debtor’s ‘disposable income,’ which is calculated solely on the basis of historical numbers and regional averages, and a debtor’s ‘projected disposable income,’ which necessarily contemplates a forward-looking number.”⁴⁸

In this regard, the United States Supreme Court requires that courts give meaning to every word in a statute,⁴⁹ and the Supreme Court has emphasized that “Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.”⁵⁰ Therefore, “projected disposable income” cannot mean the same as

45. Nowlin v. Peake (*In re* Nowlin), 576 F.3d 258, 266 (5th Cir. 2009) (emphasis added); see also Hamilton v. Lanning (*In re* Lanning), 545 F.3d 1269 (10th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3449 (U.S. Feb. 3, 2009) (No. 08-998).

46. See *infra* Part III.B.

47. “Project” is defined as “to plan, figure, or estimate for the future (~ expenditures for the coming year).” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 993 (11th ed. 2003). Black’s Law Dictionary does not define “projected.” See BLACK’S LAW DICTIONARY 1248 (8th ed. 2004).

48. Coop v. Frederickson (*In re* Frederickson), 545 F.3d 652, 659 (8th Cir. 2008), cert. denied, 129 S. Ct. 1630 (2009).

49. Negonsott v. Samuels, 507 U.S. 99, 106 (1993); see also TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (internal quotation marks omitted)).

50. BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994) (quoting Chicago v. Evtl. Def. Fund, 511 U.S. 328, 338 (1994)).

“disposable income” because the word “projected” would be superfluous. As one bankruptcy court pointed out, “Congress’ choice to use both ‘projected disposable income’ and ‘disposable income’ in the Code indicates an intent to apply different meanings to the two terms. Given this, it is common sense that while ‘disposable income’ may explicitly refer to the past, ‘projected disposable income’ undeniably looks to the future.”⁵¹ Therefore, the starting point approach correctly interprets “projected disposable income” as being intended by Congress to refer to the debtor’s actual income and expenses during the applicable commitment period if those figures have changed significantly.

Also, each of the following three phrases in § 1325(b)(1)(B) is consistent with the starting point approach’s forward-looking interpretation of “projected.” The first phrase is “as of the effective date of the plan,”⁵² and “the most logical interpretation . . . is the date of plan confirmation,” and not the date that the Chapter 13 petition was filed.⁵³ Hence this phrase is forward looking. The second phrase is “all of the debtor’s projected disposable income *to be received* in the applicable commitment period.”⁵⁴ Clearly this phrase refers to the disposable income that will be received by the debtor in the future. The third phrase is “*will be applied* to make payments to unsecured creditors under the plan.”⁵⁵ Undoubtedly, the verb “*will be applied*” is in the future tense. Moreover, the Tenth Circuit noted that the courts using the mechanical/multiplier approach pay little attention to these three phrases, thereby apparently rendering them superfluous.⁵⁶

In addition, the following Chapter 13 provisions relating to the debtor’s future earnings are consistent with the starting point approach’s forward-looking interpretation of “projected.” Under § 1306(a)(2), earnings from services that the debtor performs post-petition are included in property of the bankruptcy

51. *In re Slusher*, 359 B.R. 290, 297 (Bankr. D. Nev. 2007); *see also In re Jass*, 340 B.R. 411, 415–16 (Bankr. D. Utah 2006) (“By placing the word ‘projected’ next to ‘disposable income’ in § 1325(b)(1)(B), Congress modified the import of ‘disposable income.’ The significance of the word ‘projected’ is that it requires the Court to consider both future and historical finances of a debtor in determining compliance with § 1325(b)(1)(B).”).

52. 11 U.S.C.A. § 1325(b)(1) (West Supp. 2009).

53. *Pak v. eCast Settlement Corp. (In re Pak)*, 378 B.R. 257, 265 (B.A.P. 9th Cir. 2007).

54. 11 U.S.C.A. § 1325(b)(1)(B) (West Supp. 2009) (emphasis added).

55. *Id.* (emphasis added).

56. *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269, 1279 (10th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (U.S. Feb. 3, 2009) (No. 08-998).

estate.⁵⁷ And under § 1322(a)(1), one of the mandatory requirements of a Chapter 13 plan is “the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.”⁵⁸ In discussing these two forward-looking provisions, one bankruptcy judge eloquently summarized the problem created by the poorly drafted legislation concerning “projected disposable income” as follows:

The chapter 13 “disposable income” objection-to-confirmation problem is a classic paradox. The emphasis in §§ 101(10A) and 1325(b) on historical income as the threshold for confirming a chapter 13 plan over an objection contradicts the basic premise embodied in §§ 1306(a) and 1322(a)(1) that chapter 13 plans are funded by future income that really exists and runs counter to the only thing that appears to be unambiguous about the 2005 consumer amendments to the Bankruptcy Code: the policy that more debtors should be diverted from chapter 7 liquidations to chapter 13 repayment plans.⁵⁹

Finally, § 521, which is entitled “Debtor’s duties,” requires the debtor to file “a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition.”⁶⁰ This provision, too, is consistent with the starting point approach’s forward-looking interpretation of “projected.”

Based on the foregoing analysis, this Article asserts that the starting point approach is the best of the five judicial approaches in determining “projected disposable income.”⁶¹ One reason is that it gives initial deference to the new definition of “disposable income” in § 1325(b)(2).⁶² Also, by adjusting for significant changes in the debtor’s actual income or expenses, it effectuates

57. 11 U.S.C. § 1306(a)(2) (2006).

58. 11 U.S.C. § 1322(a)(1) (2006).

59. *Pak v. eCast Settlement Corp. (In re Pak)*, 378 B.R. 257, 268 (B.A.P. 9th Cir. 2007) (Klein, J., concurring).

60. 11 U.S.C.A. § 521(a)(1)(B)(vi) (West Supp. 2009). Note that this provision covers only “any reasonably anticipated increase in income or expenditures,” but not reasonably anticipated decreases. *Id.*

61. See also Thomas J. Izzo, Comment, *Projecting the Past: How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Befuddled § 1325(b) and “Projected Disposable Income,”* 25 EMORY BANKR. DEV. J. 521, 551–52 (2009) (favoring the starting point approach over the mechanical/multiplier approach); Matthew Showel, Student Article, *Calculating Projected Disposable Income of an Above-Median Chapter 13 Debtor*, 21 LOY. CONSUMER L. REV. 407, 426 (2009) (favoring the starting point approach over the mechanical/multiplier approach).

62. 11 U.S.C.A. § 1325(b)(2) (West Supp. 2009).

the intent of Congress to avoid bankruptcy abuse and “to ensure that debtors repay creditors the maximum they can afford.”⁶³ However, this Article disagrees with the starting point approach reconciling the backward-looking term, “disposable income,” with the forward-looking term, “projected disposable income,” by reading a *presumption* of correctness into the income and expense components of disposable income in § 1325(b)(2) and (3).⁶⁴ Congress neither expressed nor implied a presumption in § 1325(b)(2) or (3) as it did in Chapter 7 for the means test.⁶⁵ Congress did not intend for current monthly income and the means test expenses to constitute a presumption of the amount of disposable income in Chapter 13. Rather, it created a rigid mathematical test for disposable income, which often is unworkable and produces absurd results. Thus, while the starting point approach correctly uses the historical income and expense figures on Form 22C as a starting point, it relies on a presumption that does not exist.

Notwithstanding this one flaw in the starting point approach, it is the best of the five approaches that the courts have used. In Part V, this Article will propose a novel approach called “the non-presumptive starting point approach,” which relies on a Supreme Court canon of statutory interpretation and the express grant of power to the bankruptcy court in § 105(a) to accomplish the same result without relying on a presumption that does not exist.

B. *The Mechanical / Multiplier Approach*

The *minority* view is known as the mechanical approach or the multiplier approach, and it is backward-looking in nature. It interprets what it describes as the plain meaning of the undefined word “projected” as simply multiplying disposable income over the applicable commitment period.⁶⁶ Under this view, “projected” does not mean “anticipated.”⁶⁷ It construes projected

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

64. 11 U.S.C.A. § 1325(b)(2)–(3) (West Supp. 2009).

65. 11 U.S.C.A. § 707(b)(2) (West Supp. 2009); *see* Maney v. Kagenveama (*In re Kagenveama*), 541 F.3d 868, 874 (9th Cir. 2008) (“BAPCPA’s changes to the Bankruptcy Code made it clear that Congress knows how to create a presumption. *See* 11 U.S.C. § 707(b)(2) (stating when the court shall presume abuse exists).”).

66. *In re Kagenveama*, 541 F.3d at 872–74 (quoting *In re Alexander*, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006)) (“To get from the statutorily defined ‘disposable income’ to ‘projected disposable income,’ one simply takes the calculation [mandated by § 1325(b)(2)] and does the math.”); *see also* Brief of Appellant-Trustee at 21–22, *Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009).

67. *In re Kagenveama*, 541 F.3d at 874.

disposable income to mean the same as disposable income,⁶⁸ thereby rendering the word “projected” superfluous and violating the Supreme Court’s canon of statutory interpretation that requires giving meaning to every word in a statute.⁶⁹ This approach applies § 1325(b) rigidly, using the historical figures for current monthly income and the means test expenses, rather than actual income and expenses, even when there has been a significant change in the debtor’s financial circumstances.

Under this approach, Form 22C is the sole determinant of the debtor’s monthly projected disposable income, and the proponents of this interpretation argue that Congress intended a rigid mechanical test to replace judicial discretion, thereby resulting in an efficient and predictable way to calculate payments to unsecured creditors.⁷⁰ In addition, they point out that prior to the 2005 Act, projected disposable income was determined by multiplying the debtor’s disposable income over the applicable commitment period.⁷¹ However, the ostensible flaw in this argument is that the pre-BAPCPA courts were multiplying a number based on actual future income and expenses, rather than artificially determined income and expenses.⁷²

Proponents of the minority view also assert that Congress knows how to create a presumption or a starting point, but that it did not include language to that effect in the 2005 Act.⁷³ Furthermore, if the changes in the 2005 Act sometimes produce results that are undesirable, “it is up to Congress, not the courts, to amend the statute.”⁷⁴ While these assertions are true, the Supreme Court’s rule of interpretation includes a clear exception to using a literal application of a statute when it will create an absurd result.⁷⁵ However, the proponents contend that applying

68. *Id.* at 873; *see also* Brief of Appellant-Trustee, *supra* note 66, at 11, 22.

69. *See* Hamilton v. Lanning (*In re Lanning*), 545 F.3d 1269, 1280 (10th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (U.S. Feb. 3, 2009) (No. 08-998) (“Congress must have intended ‘projected disposable income’ to be different than ‘disposable income’ when it chose to define only the latter term for purposes of § 1325(b).” (quoting *In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006))); *see also supra* note 49.

70. Brief of Appellant-Trustee, *supra* note 66, at 12, 18.

71. *In re Kagenveama*, 541 F.3d at 873.

72. *See* Coop v. Frederickson (*In re Frederickson*), 545 F.3d 652, 658 (8th Cir. 2008) (“In determining a debtor’s projected disposable income pre-BAPCPA, the bankruptcy court calculated a debtor’s disposable income based on Schedules I [actual income] and J [actual expenses] and then multiplied that number by the number of months in the plan.”), *cert. denied*, 129 S. Ct. 1630 (2009).

73. *See In re Kagenveama*, 541 F.3d at 874–75.

74. *Id.* at 875 (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004)).

75. *Lamie*, 540 U.S. at 534 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)); *see also* *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (noting an exception when “the literal application of a statute

the multiplier approach does not produce absurd results. The following two hypothetical cases illustrate the inaccuracy of this argument and the absurdity of applying the literal language of § 1325(b)(2)–(3) in certain situations.

In the first example, Poor Paul is terminated from his employment on June 20, where he had been earning \$9,000 per month. Having practically no savings and being desperate to pay his creditors and save his family home from foreclosure, he files a Chapter 13 petition on July 1 and accepts the best available permanent job three weeks later paying \$5,000 per month. Poor Paul's plan proposes payments to the unsecured creditors based on his actual future income instead of the average monthly historical income for the 6-month period of January 1 through June 30, which he is no longer receiving. Under Poor Paul's plan, the general unsecured creditors will be paid 75% of their claims over a five-year period. The Chapter 13 Trustee objects to confirmation of the plan, asserting the multiplier approach to projected disposable income. She proposes a much higher monthly payment, based on the historical monthly disposable income figure on Form 22C, that will pay the general unsecured creditors 100%, even though the Trustee admits in her brief that Poor Paul is not able fund such a plan.⁷⁶

In the second example, Secured Sally maintains a steady job that she has enjoyed for the past ten years, but she has taken on large amounts of secured and unsecured debt and is unable to pay her creditors. She files a Chapter 13 petition, and because she is an above-median debtor in the applicable state, Secured Sally is required by § 1325(b)(3) to use the means test deductions.⁷⁷ She owns an average family home and a luxurious vacation home, each of which is encumbered with a mortgage. Secured Sally has surrendered the vacation home to the mortgagee, Bunglywide and Maloff Mortgage Corp., and she will have no further mortgage payments on it under her Chapter 13 plan. However, her Form 22C shows large mortgage deductions for the vacation home that reduce her monthly disposable income substantially. The plan proposes to pay the general unsecured creditors 65%, and the Chapter 13 Trustee, relying on the starting point approach, objects to confirmation for the following reasons. In the calculation of projected disposable income, the

will produce a result demonstrably at odds with the intentions of its drafters" (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

76. One of the requirements for confirmation of a Chapter 13 plan is that the plan is feasible. 11 U.S.C.A. § 1325(a)(6) (West Supp. 2009).

77. 11 U.S.C.A. §§ 1325(b)(3), 707(b)(2)(A)–(B) (West Supp. 2009).

deduction for the vacation home mortgage payments should not be allowed because they do not satisfy the “reasonably necessary to be expended” standard of § 1325(b)(2)–(3) inasmuch as they never will be paid. Therefore, the Chapter 13 plan does not provide for all of her projected disposable income to be applied to make payments to the unsecured creditors, as is required by § 1325(b)(1)(B). However, if the court adopts the multiplier approach, the nonexistent mortgage expenses will be allowed in accordance with the means test because they are “amounts scheduled as contractually due to secured creditors,”⁷⁸ and the plan will be confirmed even though Secured Sally has the actual ability to pay more to her general unsecured creditors.

In both examples, the multiplier approach uses artificial numbers that do not exist in order to calculate projected disposable income. In the first example, the debtor no longer is receiving the higher income that he was paid for almost all of the 6-month period before bankruptcy. In the second example, the debtor is attempting to deduct large mortgage expenses that were “scheduled as contractually due,” even though she will never be required to make those payments on the vacation home that she has surrendered. In both examples, the multiplier approach reaches an absurd result that Congress did not intend. On the other hand, the starting point approach begins with current monthly income and the means test expenses (for an above-median debtor), and it then adjusts for significant changes to the debtor’s actual income and expenses. In both examples, the starting point approach gives deference to the language of § 1325(b)(2)–(3) and, by adjusting for significant changes in the debtor’s financial situation, is more consistent with Congress’s intent “to ensure that debtors repay creditors the maximum they can afford.”⁷⁹

C. *The I and J Approach*

A few courts calculate projected disposable income based on the debtor’s actual anticipated income and expenses that are listed on Schedules I and J, respectively, and without even considering current monthly income based on the 6-month period before bankruptcy and the means test expenses on Form 22C (for an above-median debtor).⁸⁰ The problem with this approach is

78. 11 U.S.C.A. § 707(b)(2)(A)(iii)(I) (West Supp. 2009).

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

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

The court believes that the term “projected disposable income” must be based upon the debtor’s anticipated income during the term of the plan, not

that it “fails to give adequate meaning to the new definition of ‘disposable income,’ the one term in [§] 1325(b) that now is actually defined.”⁸¹ The following analysis explains why the I and J approach is misguided:

Congress may well have expected that the historical figure, computed generally with standard rather than actual expenses, would result in a higher “disposable-income” total for “above-median” debtors and a greater amount designated for repayment to creditors under the debtor’s chapter 13 plan. But the fact that this is often not the case does not authorize a court to ignore Form 22C altogether in determining “projected disposable income” and base it instead on Schedules I and J in the ordinary case. Such decisions cannot find support in the statutory language.⁸²

D. *The Harmonizing Approach*

The harmonizing approach is forward-looking and constitutes another judicial attempt to reconcile the established pre-BAPCPA practice of projecting “actually anticipated” income and “actually anticipated” reasonably necessary expenses during the Chapter 13 plan with the 2005 Act’s new components of disposable income, namely current monthly income minus the means test expenses (for an above-median debtor), which are backward-looking.⁸³ The harmonizing approach emphasizes the fact that Form 22C “makes no provision for reporting anticipated changes in either income or expenses during the applicable commitment period.”⁸⁴ On the other hand, Line 17 on Schedule I and Line 19 on Schedule J require, respectively, disclosure of any

merely an average of her prepetition income.

....

This does not mean that section 101(10A)’s definition of current monthly income is irrelevant to the calculation of projected disposable income. Section 101(10A) continues to apply inasmuch as it describes the sources of revenue that constitute income, as well as those that do not.

Id. In this regard, it should be noted that Schedule I does not exclude from income the exclusions stated in § 101(10A)(B), which are social security benefits, payments to victims of war crimes or crimes against humanity, payments to victims of international or domestic terrorism, or support payments that are not received on a regular basis. 11 U.S.C.A. § 101(10A)(B) (West Supp. 2009); *In re Johnson*, 400 B.R. 639, 643, 651 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom.* *Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009).

81. Brief for the United States as Amicus Curiae Supporting Reversal at 10, *Maney v. Kagenveama* (*In re Kagenveama*), 541 F.3d 868 (9th Cir. 2008) (No. 06-17083).

82. Brief for the United States as Amicus Curiae Supporting Affirmance at 16 n.7, *Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009).

83. *In re Johnson*, 400 B.R. at 649–50.

84. *Id.* at 650.

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reasonably anticipated increase or decrease in income or expenses within the year following the filing of these schedules.⁸⁵ Therefore, under the harmonizing approach, a debtor is required to “supplement Official Form 22C with a statement of any changes in the ‘current monthly income’ as reported in the form, and any changes in the expenses allowed, [that are] anticipated to take place during the applicable commitment period.”⁸⁶

While the harmonizing approach’s calculation of projected disposable income does incorporate the changes in the income inclusions and exclusions set forth in § 101(10A), it uses the debtor’s anticipated actual income and necessary expenses during the plan instead of current monthly income and means test expenses,⁸⁷ even though it recognizes the intent of Congress to “impose objective standards on Chapter 13 determinations, thereby removing a degree of judicial flexibility in bankruptcy proceedings.”⁸⁸ One rationale for continuing this pre-BAPCPA future-looking practice for the income component is based on the rule of law that “to the extent that two statutory provisions cannot be reconciled, the more specific governs the more general.”⁸⁹ Here, the reasoning is that “[t]he specific provision of § 1325(b)(1) regarding disposable income ‘to be received in the [post-filing] applicable commitment period’ must therefore be given precedence over the general definition of current monthly income in § 101(10A), which looks to income received pre-filing.”⁹⁰ Another rationale asserted for the harmonizing approach’s use of the anticipated actual income and expenses during the plan is that “BAPCPA does not clearly contradict [this practice].”⁹¹

Finally, the results produced by the harmonizing approach and the starting point approach are the same.⁹² While the

85. However, as pointed out in a previous article, § 521(a)(1)(B)(vi) “requires the debtor to file ‘a statement disclosing any reasonably anticipated increase in income or expenditures over the twelve-month period following the date of the filing of the petition.’” Waxman & Rucki, *supra* note 15, at 933. That article recommends “that Congress enact a technical amendment to this provision also covering any reasonably anticipated decrease in income or expenditures.” *Id.* at 933 n.150.

86. *In re Johnson*, 400 B.R. at 651.

87. *Id.* at 650.

88. *Id.* at 648 (quoting *Musselman v. eCast Settlement Corp.*, 394 B.R. 801, 812 (E.D.N.C. 2008)).

89. *Id.* at 649 (citing *Busic v. United States*, 446 U.S. 398, 406 (1980)).

90. *Id.*

91. *Id.* at 650.

92. The Executive Office for United States Trustees views the harmonizing approach and the starting point approach (which it calls the “presumptive approach”) as “a distinction without a difference.” It further states that “the *sole* difference between the ‘presumptive’ approach and the ‘harmonizing’ approach is the fact that the ‘presumptive’ approach affords the historical ‘disposable income’ figure found on Form 22C some

harmonizing approach's stated practice is to continue the pre-BAPCPA method of using anticipated income and expenses,⁹³ it begins with the figures for disposable income on Form 22C derived from the § 1325(b) mathematical calculation, but in circumstances where there are significant changes in income or expenses anticipated to occur during the applicable commitment period, the debtor must amend the form in order for the court to use actual income and expenses.⁹⁴ Similarly, the starting point approach looks initially to the statutorily prescribed components of current monthly income and (for an above-median debtor) the means test expenses, and it then adjusts when there are significant changes in the debtor's actual income or expenses. Conceptually, the starting point approach appears to be more in accord with the statutory language and the legislative intent because it first gives deference to the definition of disposable income in the statute⁹⁵ (and only adjusts if there have been significant changes), rather than automatically looking to the debtor's anticipated actual income and necessary expenses. As a practical matter, the difference between the two approaches is *de minimis*, and amending Form 22C when there are significant anticipated changes to income or expenses should be required.

E. Excusal from Filing Schedule I, and Resetting the 6-Month Period to Determine Current Monthly Income

Bankruptcy Code § 101(10A)(A)(ii) allows the court the discretion to reset the 6-month period for the determination of current monthly income if the debtor does not file Schedule I.⁹⁶ Under this provision, the reset 6-month period ends on "the date on which current income is determined by the court"⁹⁷ instead of "on the last day of the calendar month immediately preceding the date of the commencement of the case."⁹⁸ It appears to be used very infrequently and in circumstances involving a dramatic

presumptive weight unless a party introduces evidence of changes to income or expenses." Brief for the United States as Amicus Curiae, *supra* note 82, at 8–9.

93. *In re Johnson*, 400 B.R. at 650.

94. *Id.* at 651.

95. This Article disagrees with the starting point approach that the initial deference to the definition of "disposable income" is based on a presumption. See *infra* Part V.A.

96. 11 U.S.C.A. § 101(10A)(A)(ii) (West Supp. 2009). Section 521(a)(1)(B)(ii) requires the debtor to file a schedule of current income (Schedule I) and a schedule of current expenses (Schedule J), "unless the court orders otherwise." 11 U.S.C.A. § 521(a)(1)(B)(ii) (West Supp. 2009).

97. 11 U.S.C.A. § 101(10A)(A)(ii) (West Supp. 2009).

98. 11 U.S.C.A. § 101(10A)(A)(i) (West Supp. 2009).

change in the debtor’s income, such as the loss of a job shortly before or after the filing of the bankruptcy petition. This provision may work only in favor of the debtor, and it involves only the income component of disposable income.

Generally, the debtor files a motion to excuse the requirement for filing Schedule I, and to set an alternative date for determining current monthly income.⁹⁹ For example, in two recent Chapter 13 cases, the debtors lost their jobs shortly before bankruptcy resulting in a significant loss in income, and both were receiving unemployment benefits at the time of their motions to reset the 6-month period for calculating current monthly income.¹⁰⁰ In both cases, the courts found that the motion was filed in good faith based on such factors as the debtors’ financial situation, education, experience, initiative in seeking employment, and the particular 6-month period requested for determining current monthly income.¹⁰¹ Also, in both cases, the courts excused the filing of Schedule I and reset the 6-month period for determining the debtors’ current monthly income.¹⁰²

As a practical matter, it is helpful to note that § 1324(b) requires the confirmation hearing to be held not later than 45 days after the date of the § 341(a) meeting of creditors.¹⁰³ Also, Federal Rule of Bankruptcy Procedure 2003(a) requires that the meeting of creditors in a Chapter 13 case be held not later than 50 days after the order for relief.¹⁰⁴

99. See *In re Hoff*, 402 B.R. 683, 685 (Bankr. E.D.N.C. 2009). Section 521(i)(1) states that “if an individual debtor in a voluntary case under chapter 7 or 13 fails to file [schedules I and J] required under [11 U.S.C.A. § 521 (a)(1)(B)(ii)] within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.” 11 U.S.C.A. § 521(i)(1) (West Supp. 2009). However, this requirement is qualified by the language “unless the court orders otherwise.” 11 U.S.C.A. § 521(a)(1)(B) (West Supp. 2009).

100. *In re Dunford*, No. 09 B 09879, 2009 WL 2185634, at *1, *2 (Bankr. N.D. Ill. July 21, 2009); *In re Hoff*, 402 B.R. at 685. The husband and wife were joint debtors. The husband lost his job, and the wife was unemployed. *Id.*

101. *In re Dunford*, 2009 WL 2185634, at *6, *7; *In re Hoff*, 402 B.R. at 685–87.

102. *In re Dunford*, 2009 WL 2185634, at *2, *7 (resetting the period by two months, as requested by the debtor); *In re Hoff*, 402 B.R. at 687 (resetting the period by four months, but not six months as the debtors had requested).

103. 11 U.S.C. § 1324(b) (2006); 11 U.S.C. § 341(a) (2006).

[T]he language of section 1324(b) should be read to require only that the confirmation hearing be commenced within the deadline stated. There will be occasions on which the court cannot finish the hearing on the same day, or a proceeding to determine the amount of a claim must first be resolved, or a person necessary to the hearing is ill, and there is no reason for a rigid rule that would prevent the court from continuing the hearing to a later date.

8 COLLIER, *supra* note 14, ¶ 1324.02[2].

104. FED. R. BANKR. P. 2003(a).

Lastly, this Article asserts that resetting the 6-month period under § 101(10A)(A)(ii) is not the exclusive method by which the court may apply income figures that more accurately represent the debtor's actual future income than the average monthly income for the six months prior to bankruptcy in order to determine projected disposable income.¹⁰⁵ Part IV of the Article will discuss appellate cases that have exercised such discretion. Also, resetting the 6-month period to determine the debtor's current monthly income does not cover as many possible situations as some of the other approaches.

IV. CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS AND THE SUPREME COURT

A. *In re Lanning*

In the case of *In re Lanning*, a petition for certiorari will be considered by the United States Supreme Court in the October Term 2009 concerning the projected disposable income issue.¹⁰⁶ The case concerns an above-median debtor, whose current monthly income was greatly inflated due to a buyout by her previous employer when she was terminated during the 6-month period prior to bankruptcy.¹⁰⁷ As a result, while her Form 22C (current monthly income minus the means test expenses) showed a monthly disposable income of \$1,115, her actual monthly

105. *But see In re Dunford*, 2009 WL 2185634, at *5.

Indeed, it must be questioned whether principles of statutory consideration such as were addressed in the prior cited cases may be used at all when Congress has granted discretion over the subject in issue and circumscribed it by defining what it is and how it may be used. Discretion is granted to delay the filing of Schedule I and to reset the six-month period to compute CMI. That implies that such may be done for reasons and cause reasonably found to be appropriate. In light of the statutory scheme and expressed discretion, judicial power may not exist to create discretion from statutory analysis and to permit relief other than by the path expressly permitted by statute. The "duty of interpretation" may not arise in this situation.

Id. (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). The "prior cited cases" referred to in the second line of the above quotation are *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (U.S. Feb. 3, 2009) (No. 08-998); *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1630 (2009); and *In re Johnson*, 400 B.R. 639 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom. Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009).

106. *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (U.S. Feb. 3, 2009) (No. 08-998). The Supreme Court has invited the Solicitor General "to file a brief in this case expressing the views of the United States." *Hamilton v. Lanning*, 129 S. Ct. 2820 (2009) (mem.).

107. *In re Lanning*, 545 F.3d at 1270-71; *In re Lanning*, 380 B.R. 17, 19 (B.A.P. 10th Cir. 2007).

disposable income was \$149.¹⁰⁸ The debtor proposed a 36-month repayment plan of \$144 per month. The Chapter 13 Trustee objected and proposed a 60-month plan of \$756 per month that would pay the unsecured creditors in full, although the Trustee acknowledged that the debtor “did not have the means to fund such a plan.”¹⁰⁹

The Tenth Circuit Court of Appeals applied the starting point approach and held “that, as to the income side of the § 1325(b)(1)(B) inquiry, the starting point for calculating a Chapter 13 debtor’s ‘projected disposable income’ is presumed to be the debtor’s ‘current monthly income,’ as defined in § 101(10A)(A)(i), subject to a showing of a substantial change in circumstances,” which it left to the bankruptcy court to determine.¹¹⁰ Its analysis states that the “textual problems” of § 1325(b)(1)¹¹¹ outweigh the concern about implying a rebuttable presumption.¹¹² Thus, in order to reconcile the backward-looking definition of current monthly income with the forward-looking language in § 1325(b)(1), the court:

reads a presumption into the statute—that the defined term “disposable income” is just the starting point—which can be rebutted by showing a substantial change in circumstances bearing on how much the debtor realistically can commit to repayment of unsecured creditors as of the effective date of the plan.¹¹³

This case is a good example of how the starting point approach also implements the intent of Congress that debtors repay the most they can afford. In these circumstances, the mechanical approach would “foreclose bankruptcy protection to debtors like Ms. Lanning” because the plan would not be feasible based on her actual income, and the effect would be to allow “above-median debtors who have greater income at the time of plan confirmation to pay less to unsecured creditors than they

108. *In re Lanning*, 545 F.3d at 1271.

109. *Id.* at 1271–72; *see also* 11 U.S.C.A. § 1325(b)(4)(A)(ii) (West Supp. 2009) (requiring a five-year plan for an above-median debtor).

110. *In re Lanning*, 545 F.3d at 1282.

111. The textual problems to which the court is referring are the following forward-looking phrases that are given “little heed” by the cases using the mechanical/multiplier approach: “as of the effective date of the plan”; “to be received in the applicable commitment period”; and “will be applied to make payments.” *Id.* at 1279 (quoting 11 U.S.C.A. § 1325(b)(1) (West Supp. 2009)).

112. *Id.* It is important to note that the 10th Circuit Court of Appeals acknowledges the concern about implying a presumption that, this Article asserts, Congress did not intend.

113. *Id.* at 1278.

are able to.”¹¹⁴ However, this Article disagrees with the need to read a presumption into the statute and suggests a more justifiable legal basis for giving initial deference to the definition of disposable income.¹¹⁵

B. In re Johnson

The case of *In re Johnson* is another example of a significant change in above-median debtors' current monthly income, which was artificially inflated due to workers' compensation payments to the wife for a hand injury during the 6-month period before bankruptcy.¹¹⁶ When the debtors filed their Chapter 13 petition, they both were employed but the workers' compensation payments already had ended.¹¹⁷ Their actual monthly disposable income was \$3,705, but Form 22C showed that figure as \$4,540 because it properly included the workers' compensation payments.¹¹⁸ The debtors' Chapter 13 plan proposed monthly payments of \$3,700 for 60 months, “of which \$162,000 would be paid to general unsecured creditors,” who would receive repayment of approximately 73% of their claims.¹¹⁹ The Chapter 13 Trustee objected to confirmation solely because of the \$4,540 in monthly disposable income on Form 22C, and she argued that the general unsecured claims of \$221,191 should be paid the lesser of \$272,400 (\$4,540 multiplied by 60 months) or full payment of the \$221,291.¹²⁰

Bankruptcy Judge Eugene Wedoff introduced the harmonizing approach¹²¹ to projected disposable income and held that the debtors “must supplement Official Form 22C with a statement of any changes in . . . ‘current monthly income.’”¹²² Based on the amended Form 22C, which properly excluded the workers' compensation payments that had ended prior to the filing of the debtor's bankruptcy petition, the court overruled the trustee's objection and confirmed the debtors' Chapter 13 plan.¹²³

114. *Id.* at 1281.

115. *See infra* Part V.

116. *In re Johnson*, 400 B.R. 639, 641 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom.* Marshall v. Johnson, No. 09-1212 (7th Cir. Jan. 29, 2009).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 640, 649–50. See Part III.D of this Article for a thorough analysis of the harmonizing approach.

122. *Id.* at 651.

123. *Id.*

Pursuant to 28 U.S.C. § 158(d)(2), the trustee filed a petition for the Seventh Circuit Court of Appeals to accept certification for a direct appeal from the bankruptcy court’s final judgment, and the Seventh Circuit accepted certification for the direct appeal.¹²⁴ Oral arguments were heard on September 11, 2009.¹²⁵

C. In re Turner

In another Seventh Circuit case, *In re Turner*,¹²⁶ the Court of Appeals examined the expense component of projected disposable income. The facts show that Turner, an above-median debtor,¹²⁷ deducted on Form 22C a monthly mortgage payment of \$1,521 for his residence, which he intended to surrender to the mortgagee, and which would result in the cancellation of the debt before he would be required to make any payments to the unsecured creditors under a confirmed plan.¹²⁸ Consequently, on Form 22C, the debtor had negative disposable income of \$94.60.¹²⁹ On Schedule J, however, the debtor listed \$950 for his expected monthly rental payment, zero for any mortgage payment, and a monthly disposable income of \$250, which is the exact amount that he proposed to pay into the Chapter 13 plan for 60 months.¹³⁰

The Chapter 13 trustee, who represents the unsecured creditors, objected to the debtor’s deduction of the monthly mortgage payment from his disposable income,¹³¹ and thus he objected to confirmation “because the debtor’s plan does not provide for all of his ‘projected disposable income’ under 11 U.S.C. § 1325(b) to be contributed for payment to unsecured creditors.”¹³² The bankruptcy court, using the mechanical/multiplier approach,¹³³ overruled the trustee’s objection and

124. 28 U.S.C. § 158(d)(2) (2006); *In re Johnson*, 400 B.R. 639 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom.* Marshall v. Johnson, No. 09-1212 (7th Cir. Jan. 29, 2009).

125. Docket Report, Marshall v. Johnson, No. 09-1212 (7th Cir.) (on file with author) (showing that oral arguments were heard on Sept. 11, 2009).

126. *In re Turner*, 574 F.3d 349 (7th Cir. 2009).

127. *Id.* at 351. The fact that Turner is an above-median debtor is a fact of consequence because § 1325(b)(3) requires him to use the means test expenses in calculating his monthly disposable income. 11 U.S.C.A. § 1325(b)(3) (West Supp. 2009).

128. *In re Turner*, 574 F.3d at 351.

129. *In re Turner*, 384 B.R. 537, 538–39 (Bankr. S.D. Ind. 2008), *rev’d*, 574 F.3d 349 (7th Cir. 2009).

130. *Id.* at 539.

131. *In re Turner*, 574 F.3d at 351.

132. Brief of Appellant at 13, *In re Turner*, 574 F.3d 349.

133. *In re Turner*, 384 B.R. at 544–45; *see supra* Part III.B.

confirmed the plan.¹³⁴ In its rationale, the court treated the “amounts scheduled as contractually due to secured creditors” provision in the means test¹³⁵ as having the same meaning in Chapter 13 as it does in Chapter 7.¹³⁶

This Article emphatically disagrees. In Chapter 7, under the majority view, all amounts of secured debts “scheduled as contractually due” may be taken as an expense for the purpose of the means test snapshot of the debtor’s financial situation at the moment of bankruptcy to determine whether there is a presumption that granting a Chapter 7 discharge would be an abuse.¹³⁷ However, in Chapter 13, it would be absurd to allow the debtor an expense that he no longer will be paying because he has surrendered or intends to surrender the collateral that secures the debt to the secured creditor. Projected disposable income is forward-looking and does not include, on the expense side, payments that the debtor, by his own admission, will not be making.

The Seventh Circuit reversed the bankruptcy court, and its rationale is consistent with the interpretations asserted in this Article. More specifically, the court adopted the starting point approach and rejected the mechanical approach.¹³⁸ In addition to reaching that conclusion, the court stated the following concerning the debtor’s attempt to deduct the mortgage payments for the residence that he was surrendering to the mortgagee:

A fixed *debt* that will disappear: the deduction of mortgage expense from the Chapter 13 debtor’s disposable income is not intended to enrich the debtor at the expense of his unsecured creditors. It is intended to adjust the respective rights of a secured creditor—the mortgagee—and the unsecured creditors. Turner wants to use a *phantom deduction* to reduce the recovery by his unsecured creditors without benefiting any other creditor.

....
So the decision of the bankruptcy court must be reversed.¹³⁹

134. *In re Turner*, 384 B.R. at 546. “[B]ecause of the importance of the issue,” the bankruptcy judge also certified his order for a direct appeal to the Seventh Circuit. *In re Turner*, 574 F.3d at 351.

135. 11 U.S.C.A. § 707(b)(2)(A)(iii) (West Supp. 2009).

136. *In re Turner*, 384 B.R. at 540–45.

137. *See supra* note 26.

138. *In re Turner*, 574 F.3d at 355–56; *see supra* Part III.A–B.

139. *Id.* at 356 (second emphasis added).

D. In re Nowlin

Another case examining the expense component of projected disposable income is *In re Nowlin*.¹⁴⁰ The facts show that Nowlin, an above-median debtor, had filed an amended Chapter 13 plan proposing to pay the general unsecured creditors approximately 3% of their total claims of \$32,889.87 over 60 months.¹⁴¹ One of her expenses was the repayment of a loan from her 401(k) plan in the amount of \$1,134.79 per month.¹⁴² The loan would be completely repaid in the twenty-fourth month of the plan, after which she would be entitled to increase her 401(k) contributions by \$187.79 to reach the monthly allowable maximum.¹⁴³ The trustee objected to confirmation of the debtor’s plan because it did not include all of her projected disposable income as required by § 1325(b)(1)(B).¹⁴⁴ More specifically, the facts show that the \$947.30 per month (\$1,134.79 minus \$187.49) that would be available for months 25 through 60, after the repayment of the 401(k) loan in the twenty-fourth month, would be sufficient to repay the unsecured creditors in full.¹⁴⁵

The Fifth Circuit held that the bankruptcy court was correct in denying confirmation of the Chapter 13 plan because it did not include all of the debtor’s projected disposable income “following the repayment of her 401(k) loan, which was *reasonably certain to occur* on or before the twenty-fourth month of her sixty-month plan.”¹⁴⁶ In adopting the starting point approach, the court ruled “that a debtor’s ‘disposable income’ calculated under § 1325(b)(2) and multiplied by the applicable commitment period is presumptively the debtor’s ‘projected disposable income’ under § 1325(b)(1)(B), but that any party may rebut this presumption by presenting evidence of present or reasonably certain future events that substantially change the debtor’s financial situation.”¹⁴⁷

In reaching this conclusion, the court emphasized the following forward-looking phrases in § 1325(b)(1): “as of the effective date of the plan”; “to be received in the applicable

140. *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258 (5th Cir. 2009).

141. *Id.* at 261.

142. *Id.* at 260.

143. *Id.* at 261.

144. *Id.*

145. *In re Nowlin*, 366 B.R. 670, 676 (Bankr. S.D. Tex. 2007).

146. *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258, 267 (5th Cir. 2009) (emphasis added).

147. *Id.* at 266.

commitment period”; and “[will] be applied to make payments.”¹⁴⁸ Moreover, it relied on the interpretation of the Tenth Circuit’s decision in *In re Lanning* that (1) these three forward-looking phrases are not explained adequately by the mechanical approach; (2) “the phrase ‘to be received in the applicable commitment period’ is rendered meaningless in the mechanical approach”; and (3) Congress must have intended a “distinction between ‘projected disposable income’ and disposable income.”¹⁴⁹ In this regard, the court also relied on the Eighth Circuit’s decision in *In re Frederickson*,¹⁵⁰ which pointed out that anomalous and possibly absurd results are produced if the word “projected” is read out of § 1325(b)(1)(B) and the court “rel[ies] solely on the calculation of ‘disposable income’ on Form 22C,”¹⁵¹ without considering substantial changes in the debtor’s actual income and expenses.¹⁵²

E. *In re Frederickson*

The case of *In re Frederickson* concerns an above-median debtor, whose Form 22C showed negative disposable income of \$95.49 per month, although Schedules I minus J showed positive monthly net income of \$606.¹⁵³ The debtor’s plan proposed to pay the unsecured creditors \$600 per month during a period of 48 months, thereby repaying approximately 61% of their claims.¹⁵⁴ The trustee objected to confirmation of the plan because § 1325(b)(4)(A)(ii) requires a five-year plan for an above-median debtor.¹⁵⁵ The bankruptcy court confirmed the four-year plan, and the Bankruptcy Appellate Panel affirmed,¹⁵⁶ notwithstanding the

148. *Id.* at 263.

149. *Id.* at 264 (citing *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269, 1279–80 (10th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (U.S. Feb. 3, 2009) (No. 08-998)).

150. *Id.* at 263–64 (citing *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1630 (2009)).

151. *In re Nowlin* 576 F.3d at 264 (citing and quoting in part *In re Frederickson*, 545 F.3d at 659).

152. *In re Nowlin*, 576 F.3d at 263–64 (citing *In re Frederickson*, 545 F.3d at 658–59). The bankruptcy court in *In re Nowlin* posed the hypothetical of a situation in which a debtor had only one monthly payment remaining on a 401(k) loan at the time she filed her Chapter 13 sixty-month plan. The court stated that it would “def[y] logic” if, “[s]tarting in the second month of the plan, a debtor would be able to pocket the amount of the 401(k) loan repayment free from the Chapter 13 plan and any claims of her prepetition creditors.” *In re Nowlin*, 366 B.R. 670, 675 (Bankr. S.D. Tex. 2007), *aff’d sub nom.* *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258 (5th Cir. 2009).

153. *In re Frederickson*, 545 F.3d at 654.

154. *Id.*

155. *Id.* at 654–55.

156. *Id.* at 654.

disclosure that "[i]f the plan extended for five years, it is estimated that Frederickson's unsecured creditors would receive almost all, if not all, of their claims."¹⁵⁷ The bankruptcy court reasoned that the applicable commitment period does not apply because the parties had stipulated that the debtor has no projected disposable income and thus "there is no minimal amount which must be paid to the general unsecured creditors."¹⁵⁸

The Eighth Circuit Court of Appeals adopted the starting point approach to determine projected disposable income,¹⁵⁹ and it reversed the bankruptcy court and the Bankruptcy Appellate Panel.¹⁶⁰ Hence, the Eighth Circuit treats the disposable income calculation on Form 22C as "a starting point," but it allows "the final calculation [to] take into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income and expenses as reported on Schedules I and J."¹⁶¹ Its rationale emphasized that the starting point approach "realistically determines how much a debtor can afford to pay his creditors and maximizes the amount the debtor must pay to his unsecured creditors."¹⁶² Therefore, under the facts of this case, the court held that the debtor did have projected disposable income and that the Chapter 13 plan could not be confirmed unless it extended for the five-year applicable commitment period required by § 1325(b)(4)(A)(ii) for an above-median debtor.¹⁶³

F. *In re Kagenveama*

Another case involving an above-median debtor with negative disposable income is *In re Kagenveama*.¹⁶⁴ Form 22C showed that the debtor's disposable income, determined by subtracting the means test expenses from current monthly income, was negative \$4.04.¹⁶⁵ However, Schedules I and J showed her actual income minus actual expenses to be

157. *Id.* at 655.

158. *Id.* (citing the bankruptcy court in *In re Frederickson*, 368 B.R. 825, 828 n.5 (Bankr. E.D. Ark. 2007)).

159. *Id.* at 659.

160. *Id.* at 661.

161. *Id.* at 659.

162. *Id.* at 660.

163. *Id.* The court referred to the applicable commitment period as "a temporal requirement that does not lead to anomalous or absurd results." *Id.*; see also 11 U.S.C.A. § 1325(b)(4)(A)(ii) (West Supp. 2009); Waxman & Rucki, *supra* note 15, at 930 n.141.

164. *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 871 (9th Cir. 2008).

165. *Id.*

\$1,523.89.¹⁶⁶ The debtor's Chapter 13 plan proposed to pay \$1000 per month for 36 months, of which an estimated amount of \$9,444.38 would be paid to the unsecured creditors in the case.¹⁶⁷ The Chapter 13 trustee objected to confirmation of the plan.¹⁶⁸

The Ninth Circuit Court of Appeals, interpreting what it called "[t]he plain meaning of the word 'projected,'"¹⁶⁹ adopted the mechanical/multiplier approach to determine projected disposable income,¹⁷⁰ and it rejected the starting point approach.¹⁷¹ Under the mechanical/multiplier approach, the court simply multiplies disposable income over the applicable commitment period.¹⁷² Also, the Ninth Circuit ruled "that the 'applicable commitment period' requirement is inapplicable to a plan submitted voluntarily by a debtor with no 'projected disposable income.'"¹⁷³ Therefore, because the debtor had negative disposable income, the Ninth Circuit affirmed the bankruptcy court's order confirming the debtor's Chapter 13 plan.¹⁷⁴

It is apparent that the Ninth Circuit misinterpreted the term "applicable commitment period." Furthermore, its holding that the applicable commitment period is inapplicable if the debtor has no projected disposable income is clearly erroneous because it fails to comply with § 1325(b)(4), "which requires for confirmation that, for an above-median debtor, the plan's length must be five years *unless the 'plan provides for payment in full of all [allowed] unsecured claims over a shorter period.'*"¹⁷⁵ The Eighth Circuit criticized the same interpretation of "applicable commitment period" in *In re Frederickson*, as follows:

166. *Id.* The reasons for the difference between the disposable income figure on Form 22C and the figure obtained from Schedules I and J are that the debtor spent \$910 less on food, clothing, and other household expenses than the allowable means test expenses listed on Form 22C, and also the existence of a dispute about taxes involving approximately \$618. *See* Brief for National Association of Consumer Bankruptcy Attorneys as Amici Curiae Supporting Appellees at 2, *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008) (No. 06-17083); Telephone Interview with Ronald L. Hoffbauer, Attorney for Appellant-Chapter 13 Trustee, *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008) (Oct. 22, 2007).

167. *In re Kagenveama*, 541 F.3d at 871.

168. *Id.*

169. *Id.* at 873.

170. *Id.* at 872; *see supra* Part III.B.

171. *In re Kagenveama*, 541 F.3d at 875; *see supra* Part III.A.

172. *In re Kagenveama*, 541 F.3d at 868.

173. *Id.* at 875.

174. *Id.* at 877.

175. Waxman & Rucki, *supra* note 15, at 930 & n.141 (citing 11 U.S.C.A. § 1325(b)(4)(A)(ii) (West Supp. 2008), and quoting 11 U.S.C.A. § 1325(b)(4)(B) (West Supp. 2008)).

The resulting outcome of this interpretation is that an above-median debtor who has more actual income than actual expenses, after taking into consideration payment to secured creditors, can have his proposed plan approved without making any payments to unsecured creditors and can close out his plan in a matter of months rather than staying in the system for the full “applicable commitment period” of sixty months. This result does not comport with the clear congressional intent of BAPCPA, which was enacted “to ensure that debtors repay creditors the maximum they can afford.”¹⁷⁶

V. NOVEL APPROACH: THE NON-PRESUMPTIVE STARTING POINT APPROACH

A. *The Starting Point Approach Should Not be Based on a Presumption that Congress Never Intended*

The starting point approach generally is described as reading a presumption into § 1325(b) even though Congress did not include an express presumption in the literal language of the statute.¹⁷⁷ However, “it is a general principle of statutory construction that when ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’”¹⁷⁸ Inasmuch as Congress used the word “presume” in § 707(b)(2) to create an express presumption of abuse under the means test,¹⁷⁹ but did not use the word “presume” or “presumption” in § 1325(b) for the definition of disposable income, it is clear that an express presumption does not exist for the latter.¹⁸⁰

The next logical question is the following: Did Congress intend to create an implied presumption in § 1325(b) that “a

176. *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652, 657 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1630 (2009) (footnote omitted).

177. *See Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258, 263 (5th Cir. 2009); *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269, 1282 (10th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449, (U.S. Feb. 3, 2009) (No. 08-998); *In re Slusher*, 359 B.R. 290, 299–300 (Bankr. D. Nev. 2007); *In re Jass*, 340 B.R. 411, 418–19 (Bankr. D. Utah 2006).

178. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

179. 11 U.S.C.A. § 707(b)(2)(A)(i) (West Supp. 2009).

180. *Maney v. Kagenveama (In re Kagenveama)*, 527 F.3d 990, 997 (9th Cir. 2008) (“BAPCPA’s changes to the Bankruptcy Code made it clear that Congress knows how to create a presumption. *See* 11 U.S.C.A. § 707(b)(2) (stating when the court shall presume abuse exists). Congress could have included a presumption in § 1325(b)(1)–(2), but it did not.”), *amended by In re Kagenveama*, 541 F.3d 868.

debtor's 'disposable income' calculated under § 1325(b)(2) and multiplied by the applicable commitment period is presumptively the debtor's 'projected disposable income' under § 1325(b)(1)(B)," unless it is rebutted by evidence of significant changes in the debtor's present or future actual income or reasonably necessary expenses.¹⁸¹ Many post-BAPCPA cases and commentaries express the notion that Congress intended to create a rigid mathematical formula for disposable income, thereby "reduc[ing] the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor's income and expenses."¹⁸² In this regard, although Judge Wedoff refers to the starting point approach as "the presumptive approach" in the caption to Part 3.b of the court's opinion in *In re Johnson*,¹⁸³ he also states the following: "The primary problem with the presumptive approach is the statutory language. Nothing in § 1325(b) creates or implies a presumption of correctness in the average income from the six months before bankruptcy."¹⁸⁴

The crux of the problem is that the 2005 Act was drafted egregiously. Congress surely intended that the new definition of disposable income would work in the overwhelming majority of cases and thereby create greater consistency among the bankruptcy courts in confirming Chapter 13 plans and ensuring that debtors repay the maximum they can afford. While sometimes it does accurately represent the debtor's actual income and expenses during the applicable commitment period, in many other cases it is not an accurate predictor because it is based on historical income and expenses that might have changed significantly. And when it is not an accurate predictor, these poorly drafted definitions of disposable income, current monthly income, and the means test expenses often produce absurd results that dramatically conflict with the intentions of Congress.¹⁸⁵ The court in *In re Spurgeon* addressed this issue directly:

181. *In re Nowlin*, 576 F.3d 258, 266 (5th Cir. 2009).

182. *See, e.g., In re Frederickson*, 545 F.3d at 658 (citing Richard S. Stolker, *Debtor's Perspective: BAPCPA Issues*, 40 MD. B.J. 22, 23 (2007)), *cert. denied*, 129 S. Ct. 1630 (2009).

183. *In re Johnson*, 400 B.R. 639, 648 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom. Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009).

184. *Id.* (emphasis added).

185. *In re Frederickson*, 545 F.3d at 659 ("If we read the word 'projected' out of 11 U.S.C. § 1325(b)(1)(B) and rely solely on the calculation of 'disposable income' on Form 22C, the outcome involves anomalous, and perhaps even absurd, results.") Several good examples are when the debtor lost employment, obtained a more lucrative job, stopped receiving substantial workers' compensation benefits, surrendered collateral that cancels a secured debt, suffered additional medical expenses; or will complete repayment of a

The court also cannot ignore the purpose of the statutes. Why did Congress make the expense provisions of the Chapter 7 means test part of the disposable income test in chapter 13 cases? Congress was concerned with the deductible expenses of chapter 13 debtors with income above the family median. Congress wanted to prevent them from claiming and prevent the courts from allowing higher expense deductions than Congress thought appropriate. By keeping down deductions, Congress meant to increase disposable income and thereby increase the plan payments on general unsecured claims. The statutes will have the opposite effect if the deduction statute must be applied without regard to fact changes brought about by the chapter 13 case. That result would be absurd.¹⁸⁶

Other courts agree.¹⁸⁷ For example, the Tenth Circuit Court of Appeals in *In re Lanning* highlighted the bankruptcy court's reasoning that the mechanical/multiplier approach “leads to absurd results that are at odds with both congressional purpose and common sense.”¹⁸⁸ Similarly, the bankruptcy court in *In re Purdy* stated: “The purportedly ‘literal’ application of the statutory language advocated by the ‘multiplier’ interpretation is at odds with the manifest intent of Congress. . . . [and] produces an absurd result.”¹⁸⁹ Another example is the court in *In re Edmondson*, which concluded: “Here, it appears that taking a plain meaning approach which results in strict adherence to Form []22C would be contrary to the structure and purpose of the Bankruptcy Code as a whole and would lead to absurd results.”¹⁹⁰

B. *The Supreme Court’s Two Exceptions to the “Plain Meaning” Rule*

Therefore, instead of attempting to imply a presumption that Congress obviously did not intend, the courts using the

401(k) loan in the early months of a Chapter 13 plan; or when Form 22C shows a negative disposable income figure but Schedules I and J show actual substantial disposable income that will benefit the general unsecured creditors.

186. *In re Spurgeon*, 378 B.R. 197, 203 (Bankr. E.D. Tenn. 2007) (citing *In re Gress*, 344 B.R. 919 (Bankr. W.D. Mo. 2006)).

187. See *In re Wilson*, 397 B.R. 299, 311 (Bankr. M.D.N.C. 2008) (setting forth several cases that view the mechanical/multiplier approach as producing an absurd result).

188. *Hamilton v. Lanning* (*In re Lanning*), 545 F.3d 1269, 1273 (10th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3449 (U.S. Feb. 3, 2009) (No. 08-998).

189. *In re Purdy*, 373 B.R. 142, 150 (Bankr. N.D. Fla. 2007).

190. *In re Edmondson*, 363 B.R. 212, 217 (Bankr. D.N.M. 2007). *Contra In re Hanks*, 362 B.R. 494, 502 (Bankr. D. Utah 2007) (“[A] harsh or even illogical result is not the same thing as an absurd result . . .”).

starting point approach to determine “projected disposable income” (and to make the appropriate adjustments in cases where the debtor’s actual income or reasonably necessary expenses have changed significantly, or differ significantly from the figures on Form 22C)¹⁹¹ should rely on the Supreme Court’s guidelines for statutory interpretation. More specifically, the Supreme Court consistently has recognized two exceptions to the general rule of applying the plain meaning of a statute. One exception is when a literal application will produce an absurd result. As the Court stated in *Lamie v. United States Trustee*, “[i]t is well established that when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”¹⁹² The other exception is “in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls.”¹⁹³

With respect to § 1325(b), both exceptions apply because its literal language often produces absurd results that blatantly conflict with the intentions of Congress to reduce bankruptcy abuse and “ensure that debtors repay creditors the maximum they can afford.”¹⁹⁴ The judicial gyrations that have ensued from the legislative lunacy of the 2005 Act’s amendments to § 1325(b) constitute incontrovertible evidence that the new definition of “disposable income” and the absence of a definition for “projected

191. This Article suggests that the non-presumptive starting point approach also covers the absurd or anomalous situation in which Form 22C shows a negative disposable income figure, but the debtor’s actual income (*excluding* social security benefits and the other exclusions in § 101(10A)(B)) minus the debtor’s actual expenses shows substantial disposable income that will benefit the general unsecured creditors. *See, e.g.,* *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652, 654, 659 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1630 (2009) (finding that the debtor’s Form 22C showed negative monthly disposable income of \$95.49 while Schedules I minus J showed positive monthly net income of \$606, and holding that “the final calculation can take into consideration changes that have occurred in the debtor’s financial circumstances *as well as* the debtor’s actual income and expenses as reported on Schedules I and J” (emphasis added)). *But see* *Baud v. Carroll (In re Baud)*, No. 09-10673, 2009 WL 2876899, at *10 (E.D. Mich. Sept. 3, 2009) (holding that the Chapter 13 Trustee did not present “evidence of changed circumstances to rebut the presumption that Debtors’ ‘disposable income’ as shown on Form 22C is also Debtors’ ‘projected disposable income,’” even though Schedules I and J showed a positive net monthly income in the amount of \$402.32 (without excluding Social Security income) while Form 22C had a negative \$1,203.55)).

192. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted)).

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

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

disposable income” exemplify the rare case in which the intention of Congress, rather than the strict language of the statute, should control. The language is *irreconcilable* because “the term ‘disposable income’ demands a look back and the term ‘projected’ requires a look forward One must give way to the other, or the courts must fashion an interpretation that gives the greatest meaning to both.”¹⁹⁵ Thus, when “disposable income” does not accurately reflect the debtor’s actual income or expenses, courts should apply a starting point approach that utilizes the exception enunciated by the Supreme Court to avoid an absurd or anomalous result that never was intended by Congress.¹⁹⁶ Courts should not attempt to utilize a phantom presumption that was neither expressed nor implied. The Supreme Court has instructed as follows: “It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”¹⁹⁷

C. *The Bankruptcy Court’s Power Under § 105(a)*

Bankruptcy Code § 105(a) states: “The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.”¹⁹⁸ This broad grant of authority to the court is another sound legal basis on which a bankruptcy judge may use the non-presumptive starting point approach to rule on the confirmation of a debtor’s Chapter 13 plan, while also reconciling the conflicting forward-looking and backward-looking provisions of § 1325(b) when the debtor’s actual financial circumstances have changed significantly, or when the debtor’s disposable income based on actual income (excluding social security benefits, etc.) minus actual expenses differs significantly from the historical, artificially defined disposable income figure on Form 22C.

195. *In re Lanning*, 380 B.R. 17, 23 (B.A.P. 10th Cir. 2007), *aff’d sub nom.* *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (U.S. Feb. 3, 2009) (No. 08-998).

196. *Izzo*, *supra* note 61, at 543 (“While the Starting Point interpretation produces balanced and reasonable outcomes, the Mere Multiplication construction has the tendency to produce absurd results that are contrary to a sensible bankruptcy system.”); *Showel*, *supra* note 61, at 427–28 (“It is not reasonable to interpret the statute in a way that leads to nonsensical, counterproductive results when an interpretation that is at least as viable is available. Such a reading suggests that Congress intended nonsense when enacting the statu[t]e. That is not a reasonable supposition.”).

197. *Griffin*, 458 U.S. at 575.

198. 11 U.S.C. § 105(a) (2006) (emphasis added).

The Third Circuit emphasized:

The Supreme Court has long recognized that bankruptcy courts are equitable tribunals that apply equitable principles in the administration of bankruptcy proceedings. . . . The enactment of the [Bankruptcy] Code in 1978 . . . did not alter bankruptcy courts' fundamental nature. . . . Any lingering doubt on that point is dispelled by a string of post-enactment Supreme Court decisions . . . and by the Code itself. *See* 11 U.S.C. § 105(a).¹⁹⁹

However, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."²⁰⁰ As explained by the First Circuit Court of Appeals: "[S]ection 105(a) does not provide bankruptcy courts with a roving writ, much less a free hand. The authority bestowed thereunder may be invoked only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code."²⁰¹

Therefore, inasmuch as the right of an individual who is eligible under Bankruptcy Code § 109(e)²⁰² to seek Chapter 13 relief is an identifiable right conferred within the Code, it is evident that § 105(a) provides the bankruptcy court with the appropriate power to apply the non-presumptive starting point approach and thereby reconcile the conflicting language in § 1325(b) concerning confirmation of a debtor's Chapter 13 plan.

This express power that Congress has conferred on the bankruptcy court under § 105(a), as well as the Supreme Court's two exceptions to the plain language principle of statutory interpretation, enable the court to apply the starting point approach without resorting to the machination of an implied presumption that Congress did not intend. Therefore, when the

199. Official Comm. of Unsecured Creditors of Cybergenics Corp. *ex rel.* Cybergenics Corp. v. Chinery, 330 F.3d 548, 567 (3d Cir. 2003) (citation omitted); *see* Young v. United States, 535 U.S. 43, 50 (2002) ("[B]ankruptcy courts . . . are courts of equity and apply the principles and rules of equity jurisprudence." (internal quotation marks omitted)).

200. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

201. *Jamo v. Katahdin Fed. Credit Union (In re Jamo)*, 283 F.3d 392, 403 (1st Cir. 2002).

202. Section 109(e) provides as follows:

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$336,900 and noncontingent, liquidated, secured debts of less than \$1,010,650, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$336,900 and noncontingent, liquidated, secured debts of less than \$1,010,650 may be a debtor under chapter 13 of this title.

11 U.S.C.A. § 109(e) (West Supp. 2009).

debtor's actual financial circumstances have changed significantly, or when the debtor's disposable income based on her actual income (excluding social security benefits, etc.) minus her actual expenses differs significantly from the disposable income shown on Form 22C, applying the non-presumptive starting point approach is the most appropriate course of judicial action for the following reasons. Using its equitable powers, it will carry out the applicable Bankruptcy Code provisions in a manner that avoids an absurd result or a result that is "demonstrably at odds with the intentions of its drafters,"²⁰³ which undeniably are "to ensure that debtors repay creditors the maximum they can afford."²⁰⁴

VI. CONCLUSION

The issue of how to interpret "projected disposable income" in § 1325(b)(1)(B) is the most controversial issue in consumer bankruptcy law, and it has divided the federal courts at every level. The posture of this issue is as follows. There are five judicial approaches to determining projected disposable income. The Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals have applied the starting point approach; the Ninth Circuit has applied the mechanical/multiplier approach; one case currently is pending in the Seventh Circuit Court of Appeals in which the bankruptcy judge used the harmonizing approach; and one case is awaiting the Supreme Court's decision concerning whether to grant a petition for certiorari.

This Article asserts that the "projected disposable income" issue is ripe for Supreme Court review and that the Court's guidance will materially facilitate the adjudication of Chapter 13 cases throughout the nation. The Article concludes that the starting point approach is the best of the five judicial approaches discussed earlier, but that its one flagrant flaw is that it reads a presumption into § 1325(b) that Congress did not intend, either expressly or impliedly. Therefore, this Article proposes a novel approach called "the non-presumptive starting point approach," which more appropriately relies on a Supreme Court canon of statutory interpretation and also the express grant of power to the bankruptcy court in § 105(a) "to carry out the provisions of [the Bankruptcy Code]."²⁰⁵

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

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

205. 11 U.S.C. § 105(a) (2006).