

THE FORBIDDEN CRYSTAL BALL: INTERPRETING “PROJECTED DISPOSABLE INCOME” FOR CHAPTER 13 BANKRUPTCY PLANS AFTER BAPCPA

I. INTRODUCTION

In April of 2005, “[a]fter nearly nine years of trying,” Congress finally passed the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)¹—“a modest corrective for the way the bankruptcy code ha[d] been exploited to allow virtually anyone to write down all his debts instead of repaying some portion of them.”² BAPCPA’s champions had sought to curb consumers’ exploitation of bankruptcy’s privileges³ and to rein in a judiciary which had (allegedly) failed in its duty to police abuse.⁴ Whether, as a matter of broad policy, BAPCPA has moved bankruptcy law in a positive direction is a matter of sharp contention⁵ and beyond this

1. Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.) (2005).

2. Editorial, *Bankrupt—and Responsible*, WALL ST. J., Mar. 9, 2005, at A20. *See also infra* note 45 and accompanying text.

3. *See infra* note 38 and accompanying text.

4. *See infra* note 42.

5. Indeed, among the legal community displeasure with BAPCPA ranges from annoyance to horror. As one commentator exclaims,

From its Orwellian title, an example of deceptive advertising if ever there was one, to the last of its 512 pages, the bankruptcy bill recently passed by Congress presents numerous challenges to attorneys who represent consumer debtors. How such terrible legislation came to be passed by Congress is a story of money, political mean-spiritedness, and intellectual dishonesty There is no doubt that bankruptcy relief will be more expensive for almost all debtors, less effective for many debtors, and totally inaccessible for some debtors as a result of the new law. At the same time, other debtors, often the higher income individuals the bill was ostensibly aimed at, will find themselves better off than before because of [provisions] which can be turned to the debtor’s advantage . . . by the careful planning that only higher income debtors can afford.

Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 AM. BANKR. L.J. 191 (2005). Frustration has also been vented from the bench:

Those responsible for the passing of the Act did all in their power to avoid the proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law at distinguished universities, and many professional associations filled with the best of the bankruptcy lawyers in the country as to the perceived flaws in the Act. This is because the parties pushing the passage of the Act had . . . an agenda to make more money off the backs of the consumers in this country. It is not surprising, therefore, that the Act has been highly criticized across the country. In this writer’s opinion, to call the Act a “consumer protection” Act is the grossest of misnomers.

In re Sosa, 336 B.R. 113, 114 (Bankr. W.D. Tex. 2005).

Note's inquiry. However, it is perhaps beyond debate that the 2005 amendments are fraught with technical inconsistencies, vague language, and even bald mistakes.⁶

While this thicket of unintended consequences provides numerous opportunities for interpretation and debate, this Note considers just one. Namely, by way of amending 11 U.S.C. § 1325(b) of the Bankruptcy Code,⁷ BAPCPA appears (under certain circumstances) to sanction *lesser* payments to creditors than would have been required under the prior law. This outcome—assuming it reflects a correct interpretation of the amended subsection⁸—betrays the proclamation by BAPCPA's advocates that the law would “require[] people with the ability to repay their debts to actually repay those debts.”⁹

This Note briefly covers the history, purpose, and function of Chapter 13 bankruptcy protection and explains both how the specific subsection of Chapter 13 pertinent to this Note—§ 1325(b)—operated before BAPCPA and how it now operates. Next, I illustrate how the new law creates a conflict by apparently allowing certain Chapter 13 debtors to withhold more income from creditors than would have been allowable prior to the 2005 Act. After highlighting a series of recent court decisions confronting the issue, I explain that the strict application of the new Code adopted by some of these courts is the correct approach under the law—

6. Less than two years after the passage of the Act, BAPCPA's glitches are already well chronicled. “The list of drafting errors and incomprehensible provisions grows every day as bankruptcy professionals digest BAPCPA. . . . There will be generations of ‘technical amendments.’” Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24-7 AM. BANKR. INST. J., Sept. 2005, at 70. In her symposium piece, Professor Jean Braucher collects specific examples of “typos, sloppy choices of words, hanging paragraphs, and inconsistencies” which occur in BAPCPA: a hanging paragraph and omission of the word “period” after “910-day”; skipping a subsection (k); “using two different words, ‘waiver’ and ‘exemption,’ to refer to being excused from obtaining credit counseling until after filing”; “using the phrase ‘with respect to’ four times and in the process keeping property of the estate, as opposed to property of the debtor, subject to the automatic stay”; “requiring a disclosure that ‘you will have to pay a filing fee . . .,’ even though there is a new provision for waiver of fees in BAPCPA”; and “applying [the] attorney certification requirement to schedules filed with a petition but apparently not to schedules filed after the petition.” Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 97 & nn.17–20 (2007). See also George H. Singer, *The Year In Review: Case Law Developments Under The Bankruptcy Abuse Prevention And Consumer Protection Act of 2005*, 82 N.D. L. REV. 297, 305–79 (2006) (summarizing sixty-one distinct consumer bankruptcy issues raised by BAPCPA as revealed by judges “who have been forced to make sense of the new law’s requirements”).

7. 11 U.S.C.A. § 101 *et seq.* (2006) [hereinafter the “Code”]. For the purposes of this Note, any reference to a statutory section indicates Title 11 of the United States Code Annotated (2006), except where the 2000 version of the United States Code is explicitly referenced. The 2006 U.S.C.A. is cited because, as of this printing, the 2006 U.S.C. has not yet been officially published.

8. Differing interpretations are explored in Parts II.B.1, 2, *infra*.

9. Senator Orrin G. Hatch, 151 CONG. REC. S2459 (2005). See also *infra* note 38.

notwithstanding the admirable efforts of others straining to achieve more equitable results. Finally, I propose a rewording of the amended subsection which should benefit debtors, creditors, and the judiciary by removing ambiguity while respecting the intent of BAPCPA's drafters.

II. HISTORY AND BACKGROUND

A. Statutory Background

1. Origins and Purpose of Chapter 13 Bankruptcy

The power to create a national system of bankruptcy law is expressly conferred on Congress by the Constitution.¹⁰ Today, bankruptcy law is governed by the Bankruptcy Code¹¹ which is contained in Title 11 of the United States Code pursuant to the Bankruptcy Reform Act of 1978.¹² The Code is divided into various chapters;¹³ consumer bankruptcies are primarily governed by Chapters 7 and 13.¹⁴ Stated most simply, consumer

10. "The Congress shall have Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

11. 11 U.S.C.A. § 101 *et seq.*

12. Pub. L. No. 95-598, 92 Stat. 2549. *See* 1 COLLIER ON BANKRUPTCY ¶ 1.01 (Alan N. Resnick & Henry J. Sommer eds., 15th rev. ed., 2006). Prior to 1978 the Code principally operated according to the Bankruptcy Act of 1898. *Id.* The 1898 Act governed bankruptcy law for some 80 years; prior to that time bankruptcy statutes had been several and short lived. *Id.* The 2005 amendments are the most sweeping revision of the Bankruptcy Code since 1978; however, there have been more modest intervening revisions. *See also* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; Bankruptcy Judgeship Act of 1992, Pub. L. No. 102-361, 106 Stat. 965; Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

13. Nine chapters, to be precise. The first three chapters cover general provisions, case administration, and provisions common to the various forms of bankruptcy relief. *See* §§ 101–12, 301–66, 501–62 (2006). The remaining six chapters govern specific relief schemes: Chapter 7 "Liquidation," §§ 701–84; Chapter 9 "Adjustment of Debts of a Municipality," §§ 901–46; Chapter 11 "Reorganization," §§ 1101–74 (primarily for businesses, but see *infra* note 14); Chapter 12 "Adjustment of Debts of a Family Farmer or Fisherman with Regular Income," §§ 1201–31; Chapter 13 "Adjustments of Debts of an Individual with Regular Income," §§ 1301–30; and Chapter 15 "Ancillary and Other Cross Border Cases," §§ 1501–32. Chapter 15 was added by BAPCPA, Pub. L. No. 109-8, § 801(a), 119 Stat. 23, 134 (2005).

14. Since a consumer is not a municipality (Chapter 9), and unless they have a cross-border case (Chapter 15) or qualify for farmers' or fishermen's relief (Chapter 12), Chapters 7, 11, and 13 are the only relief schemes available to consumers under the Code. Chapter 11 is commonly associated with business bankruptcy; however, the Supreme Court has noted that while "the structure and legislative history of chapter 11 suggest that it was intended primarily to aid business debtors, the plain language of the statute allows individual debtors not engaged in business to proceed under chapter 11." 7 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 1100.02, *citing* Toibb v. Radloff, 501 U.S. 157, 166 (1991). Nevertheless, Chapter 11 is an exceedingly unpopular choice for consumers. For instance, in 2003, scarcely more than one-twentieth of one percent of nonbusiness bankruptcies were Chapter 11 cases. *See* Press Release, Federal Judiciary, Table F-2, U.S. Bankruptcy Courts, Business and Nonbusiness Bankruptcy Cases Commenced by Chapter of the Bankruptcy Code, During the 12-

bankruptcy relief erases most of a consumer's debt after her property has been sold and the proceeds have been distributed to creditors (Chapter 7),¹⁵ or after the consumer has completed a payment plan to creditors (Chapter 13).¹⁶ Whichever the scheme chosen, the underlying purpose of declaring bankruptcy is to take advantage of the "fresh start" that bankruptcy provides in order to be free from what might otherwise be a lifetime of subservience to inescapable debt.¹⁷ Chapter 13 effects this purpose by "facilitat[ing] adjustments of all types of debts of individuals with regular income through extension and composition plans funded out of future income, under the protection of the court."¹⁸

2. Chapter 13 Overview; Plan Components and Confirmation

A debtor seeking protection and relief under Chapter 13 initiates the process by filing a petition with the court.¹⁹ Once the petition is filed, three important things happen: an automatic stay is effected,²⁰ a bankruptcy

Month Period Ending December 31, 2003 (Feb. 24, 2004), http://www.uscourts.gov/Press_Releases/1203f2.xls.

15. Chapter 7 "liquidation" bankruptcy provides for the sale of all a debtor's "non-exempt" assets, with an orderly distribution of the proceeds to classified groups of creditors. *See* 6 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 700.01. All otherwise outstanding debt is discharged, subject to certain exceptions. *Id.*

16. In contrast to Chapter 7, Chapter 13 provides for a "payment plan" to creditors over time and does not require a debtor's property to be liquidated. *See* 8 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 1300.01. Chapter 13 has the benefit of allowing debtors to keep their possessions, but has a more limited discharge than Chapter 7. *Compare* § 1328(a) with § 727(b).

17. *See, e.g.,* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

One of the primary purposes of the bankruptcy act is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.

Id. (citations omitted).

18. 8 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 1300.02.

19. 11 U.S.C.A. § 301, FED. R. BANKR. P. 1002. Section 301 controls the initiation of bankruptcy proceedings under any chapter. § 301(a). With the petition, a debtor must submit various forms, schedules, and statements detailing financially relevant information such as assets, income, expenses, and debts. *See generally* § 521. Among these are Schedules I and J which detail current income and expenses, respectively. § 521(a)(1)(B)(ii). Schedules I and J are found on Official Bankruptcy Form 6. *See also* 4 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 521.04. These schedules are important to the discussion under Part II.B, *infra*, of BAPCPA's changes to § 1325(b) and the conflict caused by these changes.

20. § 362. The "automatic stay" operates from the moment of the filing of a petition, and generally prohibits any debt collection action by any creditor against the debtor. § 362(a). This prohibition is broad and strict, though limited exceptions may apply. *See* 3 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 362.03; 11 U.S.C.A. § 362(b).

estate is created,²¹ and a trustee is appointed.²² The job of the trustee is to mediate the bankruptcy process by working closely with creditors, the debtor, and the court to ensure that the plan is administered fairly for all interested parties.²³ For a Chapter 13 petitioner, a payment plan must be filed contemporaneously with the petition.²⁴ Generally, the plan will lay out proposed monthly payments to creditors²⁵ as well as a commitment period—the period of time over which these payments will be made.²⁶

A debtor's Chapter 13 plan will have a substantial impact on creditors,²⁷ few of which, if any, will receive the full value of their claims.²⁸ Section 1325 therefore contains several provisions safeguarding creditors' interests, such as the "good faith,"²⁹ "best interests,"³⁰ and "best efforts"³¹ tests. This Note focuses on the third.³²

21. § 541(a). Loosely, the bankruptcy estate consists of everything a debtor owns at the time of filing. *Id.* In a Chapter 7 proceeding, the trustee will generally control that property. § 363. But while a Chapter 13 debtor's property is technically within the bankruptcy estate, the debtor is permitted to retain possession and control of it. § 1303.

22. § 1302.

23. *Id.* Some courts have a "standing trustee" appointed by the United States trustee. § 1302(a). "Otherwise, the United States trustee shall appoint one disinterested person to serve . . ." *Id.* In Chapter 13 bankruptcy, the trustee will typically receive all of a debtor's income during the plan period and distribute the proceeds to the debtor and creditors. *See* § 1322(a)(1). The court opinions discussed in Part II.B, *infra*, generally follow from objections made by trustees to a debtor's proposed payment plan.

24. § 1321; FED. R. BANKR. P. 3015.

25. Holders of "priority" claims must be paid in full before general unsecured creditors. § 1322(a)(2). *See* § 507 for a listing and description of priorities.

26. Plans may not exceed five years. *See* § 1322(d). A debtor with income below the state median income cannot have a plan longer than three years unless the court, "for cause, approves a longer period, but the court may not approve a period that is longer than 5 years." § 1322(d)(2)(C).

27. For better or worse, a confirmed Chapter 13 plan "bind[s] the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." § 1327(a).

28. With secured creditors, a debtor may "cram down" a payment plan which reduces the creditor's allowance to the value of the collateral securing the claim, even if the claim exceeds the collateral's value. *See* § 1325(a)(5)(B); 8 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 1325.06.

For unsecured creditors, claims typically receive only pennies on the dollar. *See, e.g.,* Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 430 (1999) (demonstrating in a late 1990s sample that unsecured creditors received only 15.2 percent of their claims in Chapter 13 plans). While creditors will necessarily be better off than if the debtor had filed for Chapter 7 (*see infra* note 30), creditors and trustees are nonetheless keenly interested in ensuring a debtor's plan provides for the maximum payment possible.

29. Section 1325(a)(3) requires that a plan be "proposed in good faith and not by any means forbidden by law." *See also* 8 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 1325.04.

30. *See* 8 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 1325.05. Section 1325(a)(4) expressly requires that a creditor not be worse off under the Chapter 13 plan than it would be under a Chapter 7 liquidation.

31. Collier describes this requirement as the "ability-to-pay" test. 8 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 1325.04. *But see, e.g.,* Villanueva v. Dowell, 274 B.R. 836, 840 (B.A.P. 9th Cir. 2002)

The best efforts test is codified at § 1325(b). Section 1325(b)(1) provides in pertinent part:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless . . . (B) the plan provides that *all of the debtor's projected disposable income* . . . will be applied to make payments to unsecured creditors under the plan.³³

Immediately prior to the 2005 amendments, the “disposable income” referred to above was defined by § 1325(b)(2) as “income . . . which is not *reasonably necessary* to be expended [on costs of living].”³⁴ Because the pre-BAPCPA code did not otherwise define “income” or “expenses,” these were presumed to be the actual, to-date monthly income and expenses reported by the debtor to the court on Schedules I and J.³⁵ The term “reasonably necessary” was also not defined by the Code.³⁶ Therefore, prior to BAPCPA, if a trustee or creditor objected that a debtor had violated §§ 1325(b)(1)(B), (b)(2) because the debtor’s listed expenses

(“[Section 1325(b)] is commonly referred to as the ‘best efforts’ test.”).

32. The “best interests” test (*see supra* note 30) is fairly straightforward and is not relevant to this Note. However, the “good faith” provision is in fact important to the construction of the post-BAPCPA “best efforts” test and will be revisited in Part II.B.1 below. *See infra* notes 107–09 and accompanying text.

33. § 1325(b)(1) (emphasis added). Subsection 1325(b)(1)(A) provides in the alternative that a debtor may avoid forfeiting all of her disposable income if she pays her debts in full. The best efforts test was added to the Code by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 317, 98 Stat. 333, 356. The only alteration of § 1325(b)(1)(B) made by the 2005 amendments is that the current phrase “applicable commitment period” replaces the phrase “three year period.” BAPCPA, Pub. L. No. 109-8, § 318(2), 119 Stat. 23, 93 (2005). That change does not affect the law that is the focus of this Note.

34. 11 U.S.C. § 1325(b)(2) (2000) (emphasis added). Prior to BAPCPA, subsection 1325(b)(2) provided in its entirety:

For purposes of this subsection, “disposable income” means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) For the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

Id.

35. *See, e.g., In re Miller*, 361 B.R. 224, 226 (Bankr. N.D. Ala. 2007) (“Prior to the bankruptcy amendments, Schedules I and J were the primary source of evidence used to satisfy the disposable income test under § 1325(b).”). *See also* note 19, *supra*, for an explanation of these documents.

36. *See In re Nicola*, 244 B.R. 795, 797 (Bankr. N.D. Ill. 2000) (“What is ‘reasonably necessary’ is a question of fact for which the outcome can vary from judge to judge and jurisdiction to jurisdiction.”).

were not “reasonably necessary,” the court brought its own subjective judgment to bear on these disputed items.³⁷

3. *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) into law. The law was ostensibly enacted to correct widespread abuse of the bankruptcy system by irresponsible debtors.³⁸ Upon signing, the President declared,

In recent years, too many people have abused the bankruptcy laws. They've walked away from debts even when they had the ability to repay them. . . . The bill I sign today helps address this problem. Under the new law, Americans who have the ability to pay will be required to pay back at least a portion of their debts.³⁹

Prior to BAPCPA, the Code gave bankruptcy judges the discretion to dismiss Chapter 7 cases (or force Chapter 7 petitioners into a Chapter 13 payment plan) if granting the debtor relief “would be a substantial abuse”

37. “Individual judges’ normative beliefs concerning how much a debtor should be required to sacrifice [were] found in every substantial abuse decision.” Harriet Thomas Ivy, Note, *Means Testing Under The Bankruptcy Reform Act of 1999: A Flawed Means to a Questionable End*, 17 EMORY BANKR. DEV. J. 221, 241 (2000). See, e.g., *In re Rogers*, 65 B.R. 1018, 1022 (Bankr. E.D. Mich. 1986) (holding that Corvette payments amount to “pampering [the debtor’s] own psyche at the expense of her unsecured creditors”); *In re Hedges*, 68 B.R. 18 (Bankr. E.D. Va. 1985) (boat payments are a luxury expense and are not reasonably necessary under § 1325(b)); *In re Jones*, 55 B.R. 462, 467 (Bankr. D. Minn. 1985) (holding that listed expenses falling outside the “reasonably necessary” standard included \$500 per month for college tuition, \$500 per month for secondary school tuition (“particularly in view of the high quality public education available in this country”), \$515 per month for food for a family of four, and a monthly mortgage payment of \$989 (“well above the amount necessary to provide adequate housing for a family of four.”)); *In re Festner*, 54 B.R. 532, 533 (Bankr. E.D.N.C. 1985) (“Additional pension plans and stock purchases may be a wise investment which enhance an individual’s financial security, but the debtor is not entitled to acquire them at the expense of unpaid creditors.”). See also Robert G. Drummond, *Disposable Income Requirements under Chapter 13 of the Bankruptcy Code*, 57 MONT. L. REV. 423 (1996) (explaining the calculation of pre-BAPCPA disposable income).

38. As Senator Orrin G. Hatch explained, “No responsible society can long countenance the open flouting and abuse of its laws. This bill, with its means test, will discourage . . . abusive filings by restricting access to chapter 7 liquidation by those with relatively high incomes. We should all stand behind a law that requires people with the ability to repay their debts to actually repay those debts.” 151 CONG. REC. S2459 (2005). See also Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

39. Press Release, President George W. Bush, “President Signs Bankruptcy Abuse Prevention, Consumer Protection Act” (Apr. 20, 2005), <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html>.

of the Code.⁴⁰ This safeguard relied on a subjective judgment from the bench as to what constituted “abuse.”⁴¹ However, many in Congress, distrusting the judiciary’s sensibilities regarding the definition of abuse,⁴² preferred instead to mechanize this standard with strict mathematical criteria.⁴³ These criteria have come to be known as the “means test.”⁴⁴ After years of legislative haranguing,⁴⁵ BAPCPA finally grafted the means test onto the Code in § 707(b).⁴⁶

40. 11 U.S.C. § 707(b) (2000).

41. Since “substantial abuse” was not defined by statute, the approaches taken by courts varied to some degree, but two factors were of paramount importance: a debtor’s ability to pay, and forthrightness. *See* 6 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 707.04. This formulation by the Sixth Circuit was typical:

In determining whether [a debtor has committed “substantial abuse” according to § 707(b),] a court should ascertain from the totality of the circumstances whether he is merely seeking an advantage over his creditors, or instead is “honest,” in the sense that his relationship with his creditors has been marked by essentially honorable and undeceptive dealings, and whether he is “needy” in the sense that his financial predicament warrants the discharge of his debts in exchange for liquidation of his assets. Substantial abuse can be predicated upon either lack of honesty or want of need.

Behlke v. Eisen, 358 F.3d 429, 434 (6th Cir. 2004) (citations omitted).

42. According to a House Judiciary Committee report, “The standard for dismissal—substantial abuse—is inherently vague, which has led to its disparate interpretation and application by the bankruptcy bench.” H.R. REP. NO. 109-31, pt. 1, at 12 (2005). In an earlier round of legislative debate, one pair of commissioners announced that

a desperate need [exists] for changes in the Bankruptcy Code and its administration. . . . [T]he system lacks effective oversight or control over its integrity. Uncovering and penalizing abusive or fraudulent practices is haphazard, despite the duty of debtor and creditor attorneys, panel and Chapter 13 trustees, judges, U.S. trustees and bankruptcy administrators, and U.S. attorneys’ offices to maintain integrity.

Report of the National Bankruptcy Review Commission, Chapter 5, Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners, at 2 (1997), *available at* <http://govinfo.library.unt.edu/nbrcreport/24commvi.pdf>.

43. *See* Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 119 (1999) (noting that an earlier legislative draft of stricter bankruptcy controls created “an algorithm purposefully designed to limit judicial discretion on the issue of consumer debtor abuse”). *See also* Jensen, *supra* note 38.

44. *See, e.g.*, 6 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 707.05.

45. *See* Jensen, *supra* note 38 (detailing the evolution and various incarnations of the BAPCPA amendments from 1994 to 2005). The means test was hotly contested. Prior to BAPCPA’s passage, Senator Richard J. Durbin declared,

The way the law works now, bankruptcy judges have the authority and discretion to look at how much debt a person has and how they acquired the debt. Then the judge decides: Is this someone who is trying to game the system? Is this someone who has been dealt some hard blows in life? Is this debt brought on by buying a plasma screen television, or taking that cruise, or is it a desperate effort to pay doctors’ bills and buy groceries and not see the house foreclosed on?

The means test in this bill wipes out the judge’s discretion. The judge can’t look at a real person. The judge looks at numbers on paper. The means test isn’t really meant to screen out cheaters. There is already a provision in the law for that. It is designed to trip people up, add legal expenses, and force more families into chapter 13.

The means test functions by “presum[ing] abuse exists” according to the size of a debtor’s net income.⁴⁷ In other words, if a debtor’s income⁴⁸ minus expenses⁴⁹ is sufficiently large,⁵⁰ the debtor can presumably afford to pay back some debt over time.⁵¹ Under the BAPCPA paradigm, therefore, allowing such a debtor to proceed with a Chapter 7 discharge (leaving unsecured creditors with next to nothing)⁵² would be an abuse of the system.⁵³ Hence, if the abuse trigger is sprung, the debtor must proffer a Chapter 13 payment plan—or receive no relief at all.⁵⁴

While the specific mechanics of the § 707(b) means test are not germane to this Note, certain components of the net income calculation

151 CONG. REC. S 1823 (2005).

46. BAPCPA, Pub. L. No. 109-8, § 102, 119 Stat. 23, 27–32 (2005) (codified at 11 U.S.C.A. § 707(b)). With the addition of the means test, § 707(b) increased from 156 words pre-BAPCPA to 2,459 words after the amendments.

47. Specifically, § 707(b)(2)(A)(i) provides,

In considering . . . whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor’s current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—(I) 25 percent of the debtor’s nonpriority unsecured claims in the case, or \$6,575, whichever is greater; or (II) \$10,950.

48. Section 707(b)(2)(A)(i) specifies that the starting point is “current monthly income.” This in turn is defined by § 101(10A) as a debtor’s six-month pre-petition average income. *See also infra* note 63 and accompanying text.

49. Generally, expenses include living expenses (§ 707(b)(2)(A)(ii)), payments on secured debts (§ 707(b)(2)(A)(iii)), and payments on priority claims (§ 707(b)(2)(A)(iv)).

50. *See supra* note 47.

51. “[M]eans testing has a simple purpose: to measure the ability of Chapter 7 debtors to repay debt and then, if they have sufficient debt-paying ability, to make them repay at least some of their debt—likely through Chapter 13—in order to receive a bankruptcy discharge.” Hon. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2005).

52. “Unless they hold a nondischargeable claim or can somehow pressure the debtor to reaffirm, [unsecured creditors] receive nothing in the overwhelming majority of all consumer chapter 7 cases in which the debtors have no unencumbered, non-exempt assets.” Scott F. Norberg, *Consumer Bankruptcy’s New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 424–25 (1999). By comparison, Chapter 13 is much more preferable for unsecured creditors. *See id.* (describing a study showing a 15.2 percent return to unsecured creditors under Chapter 13 plans).

53. *See* Wedoff, *supra* note 51, at 236 (noting that under the post-BAPCPA regime, “ability to repay debt, standing alone, is sufficient to establish abuse”).

54. If granting Chapter 7 relief would be an “abuse,” “the court . . . may dismiss [the] case . . . or, with the debtor’s consent, convert such a case to a case under chapter 11 or 13 of this title” § 707(b)(1). While Chapter 11 is technically an option for consumers, it is exceedingly unpopular for nonbusiness bankruptcy. *See supra* note 14.

The means test comes with a few caveats. For instance, § 707(b)(2)(B)(i) provides special circumstances which may allow a debtor to overcome the presumption of abuse. Additionally, debtors who fall below the median income level for their locality are exempt from the means test. § 707(b)(7)(A). However, these below-median debtors will still be subject to a limited review for abuse according to good faith standards and the “totality of the circumstances.” *See* §§ 707(b)(1), (3), (6).

within the means test are. In particular, § 707(b)(2)(A)(ii)(I) mandates that living expenses, which are to be deducted from income in means test calculations, be determined according to national and local tables of living expenses promulgated by the Internal Revenue Service.⁵⁵ These expense tables are incorporated by reference into Chapter 13⁵⁶ and significantly impact post-BAPCPA plan confirmations.⁵⁷

In addition to codifying the means test in Chapter 7, BAPCPA made several major alterations to Chapter 13.⁵⁸ These changes included two important adjustments to the Chapter 13 best efforts test.⁵⁹ First, a debtor's "current" income is no longer the *actual* current net income reflected by Schedule I.⁶⁰ Post-BAPCPA § 1325(b)(2) now reads, "For purposes of this subsection, the term 'disposable income' means *current monthly income* received by the debtor . . . less amounts reasonably necessary to be expended . . ."⁶¹ This change is significant when read in combination with BAPCPA's new definition of "current monthly income" codified at 11 U.S.C. § 101(10A). Paradoxically, § 101 requires that "current"

55. The drafters of BAPCPA, in search of a "uniform repayment standard, applicable like a rubber stamp to every family," lighted upon the "National Standards" promulgated by the IRS. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 162 (5th ed., Aspen Publishers 2006). These tables already existed for use in IRS negotiations with delinquent taxpayers, serving as a watermark for how much a consumer ought to be able to afford in tax repayment plans. *Id.* These tables are actively managed by the IRS, and are subject to change. *Id.* at 163. For an interesting contention that use of the IRS National Standards in § 707(b)(2) may be unconstitutional, see Thomas E. Ray, *Constitutionality of the Means Test: Does It Lack Uniformity?*, AM. BANKR. INST. J., Nov. 2005, at 6.

56. See *infra* note 65 and accompanying text.

57. See *infra* notes 83–89 and accompanying text for an illustration of the effect of this change. For above-median debtors, the means test under § 707(b) breaks expenses down into five categories, as summarized by the court in *In re McGuire*:

(1) those that fit into the IRS' National Standards, which include food, clothing, household supplies, personal care, and miscellaneous expenses; (2) those that fit into the IRS' Local Standards, which include housing and transportation; (3) actual expenses for items categorized by the IRS as 'Other Necessary Expenses,' including such items as taxes, mandatory payroll deductions, health care, and telecommunication services; (4) actual expenses, with limitations, for certain other expenses specified by the Bankruptcy Code, such as care for disabled family members and tuition; and (5) payments on secured and priority debts.

342 B.R. 608, 612 (Bankr. W.D. Mo. 2006).

58. See, e.g., BAPCPA, Pub. L. No. 109-8, §§ 102(g), (i), 106(c), 213(7)–(10), 219(d), 224(d), 306(a), (b), 309(c), 119 Stat. 23, 33–35, 38, 53, 58, 65, 80, 83–84 (2005).

59. See *supra* note 33 and accompanying text for the language of the best efforts test, codified at § 1325(b). Section 1325(b) was amended by BAPCPA, Pub. L. No. 109-8, § 102(h), 119 Stat. 23, 33 (2005).

60. See *supra* note 34. Schedules I and J reflect the present, "actual" income and expenses of a debtor as of the date of their petition.

61. § 1325(b)(2) (emphasis added). See *supra* note 34 and accompanying text for the pre-BAPCPA wording of § 1325(b)(2).

monthly income be measured exclusively by a debtor's *historical* earnings⁶²: it is all income (whether typical or not) received by the debtor during the six months preceding bankruptcy, divided by six.⁶³ The debtor provides this calculation on Form B22C.⁶⁴

The second important change to the best efforts test is codified under new subsection 1325(b)(3). This provision stipulates that if a debtor's income is above her locality's median income, her "reasonable and necessary expenses" are to be determined according to the § 707(b) means test.⁶⁵ Like the new current monthly income calculation, these expenses are provided by the debtor on Form B22C.⁶⁶ This is an abrupt departure from the pre-BAPCPA practice of gleaning a debtor's actual expenses from Schedule J⁶⁷ and having a judge subjectively determine whether they are in fact "reasonably necessary."⁶⁸

B. Post-BAPCPA Dilemma for Chapter 13 Plan Confirmation

One court has aptly characterized the pre- and post-BAPCPA disposable income tests as the "crystal ball" and "rear view mirror" methods, respectively.⁶⁹ In other words, since the pre-BAPCPA Code

62. "Although it has been correctly noted, borrowing from history's judgment of the Holy Roman Empire, that [current monthly income] is not current, not really monthly, or necessarily income, Congress felt this was how income should be determined." *In re Kolb*, 2007 Bankr. LEXIS 993, at *19 n.12 (Bankr. S.D. Ohio 2007).

63. Section 101(10A) specifically provides: "'current monthly income' . . . means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period [preceding the commencement of the case] . . ." *See also* 2 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 101.10A.

64. Official Bankruptcy Form 22C, Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13), available at http://www.uscourts.gov/rules/BK_Forms_06_Official/Form_22C_0407.pdf [hereinafter Form B22C]. *See also* Form 22A, A COLLIER ON BANKRUPTCY, *supra* note 12, App. Pt. 2-562-67.

65. § 1325(b)(3). *See supra* note 57 for an explanation of means test expenses. Though it is not important to this Note, being above or below the applicable median income also determines the "applicable commitment period" for the plan. *See also* § 1325(b)(4); *supra* note 26.

The rationale for inserting the means test into the Chapter 13 plan confirmation process is not immediately clear from the legislative record. However, the general policy choice that led to inclusion of the means test in Chapter 7 presumably applied in the Chapter 13 context as well. *See* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is The Means Test The Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 667 (2005) (Congress imposed the means test on bankruptcy courts to prevent "each bankruptcy judge's idiosyncratic views" from leading to disparate results, increased litigation, or a contravention of Congressional policy choices).

66. *See supra* note 64.

67. *See supra* note 34. However, Schedule J is still completed and submitted in addition to Form B22C. *See supra* note 19.

68. *See supra* notes 36, 37 and accompanying text.

69. *In re Guzman*, 345 B.R. 640, 645 (Bankr. E.D. Wis. 2006).

focused on anticipated disposable income as informed by Schedules I and J, courts in effect looked to the future—as one would consult a crystal ball—to determine what a debtor could afford to pay in her plan. But with BAPCPA’s incorporation of historical figures as a basis for current monthly income⁷⁰ (and with the use of static expense tables for above-median debtors),⁷¹ courts applying § 1325(b) today consult a figurative rear view mirror instead. As noted above, the strictures of BAPCPA were professedly designed to compel increased payments to creditors (or at least to permit less abusive behavior by petitioning debtors).⁷² However, when put into practice, the post-BAPCPA rear view mirror approach has allowed some debtors to claim less disposable income (and thereby propose to pay less to creditors) than would have been permissible prior to the amendments. In fact, such debtors frequently propose to pay nothing at all.⁷³ This seems inconsistent with the proclamation by BAPCPA’s advocates that, thanks to the 2005 Act, able debtors will be required to repay more of their debts.⁷⁴ Some recent cases help illustrate the problem.

The effect of the new current monthly income definition is aptly demonstrated by the facts of *In re Kibbe*.⁷⁵ Upon filing her Chapter 13 bankruptcy petition, petitioner Kibbe reported monthly earnings of \$5,027.00 on her Schedule I.⁷⁶ However, as it turned out, Kibbe had been involuntarily underemployed for most of the six months preceding her petition.⁷⁷ As a result, her Form B22C showed a “current monthly income” of only \$1,068.50.⁷⁸ Kibbe also reported actual household expenses of \$2,645.00 per month on Schedule J.⁷⁹ Therefore, while she would have

70. The debtor’s six-month pre-petition average income. 11 U.S.C.A. §§ 1325(b)(2), 101(10A) (2006).

71. 11 U.S.C.A. § 1325(b)(3) (2006); *see also supra* note 55 and accompanying text.

72. *See supra* notes 38–39, 43 and accompanying text.

73. *See, e.g., In re Edmunds*, 350 B.R. 636 (Bankr. D.S.C. 2006); *In re Rotunda*, 349 B.R. 324 (Bankr. N.D.N.Y. 2006); *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wis. 2006).

74. *See* Henry E. Hildebrand, III, *Unintended Consequences: BAPCPA and the New Disposable Income Test*, AM. BANKR. INST. J., Mar. 2006, at 54 (“It should come as no surprise that this dramatic and unrecognized impact of the visceration of the disposable-income test has confounded the community of chapter 13 trustees.”); *see also* text accompanying *supra* note 39.

75. 342 B.R. 411 (Bankr. N.H. 2006), *aff’d sub nom. Kibbe v. Sumski*, 361 B.R. 302 (B.A.P. 1st Cir. 2007).

76. *Id.* at 413.

77. *Id.*

78. *Id.* Calculated as the average of the debtor’s income for the preceding six months according to §§ 1325(b)(2), 101(10A). This calculation was, of course, understated due to Kibbe’s intermittent employment.

79. *Id.* at 414. Because Kibbe was a “below-median” debtor (according to the \$1,068.50 current monthly income calculation), means test expenses were not required to be incorporated under § 1325(b)(3). *Id.* at 414 n.5. *See also supra* note 65 and accompanying text for an explanation of

shown \$2,382.00 in disposable income before the 2005 amendments,⁸⁰ strictly applying the new current monthly income definition provided by BAPCPA would have resulted in a monthly position of *negative* \$1,576.50.⁸¹ According to this construction, Kibbe argued that she did not have to pay anything to her unsecured creditors—even though she actually had plenty of extra money each month which she would have had to surrender before BAPCPA.⁸²

While *Kibbe* highlights the difficulty with strictly applying the post-BAPCPA definition of income, *In re Barr*⁸³ nicely frames the problem posed by BAPCPA's alteration of the definition of expenses.⁸⁴ Upon filing for Chapter 13 bankruptcy, petitioner Barr proposed that the unsecured creditors to whom she owed \$28,979.00⁸⁵ be paid nothing—even though her actual disposable income was \$513.00 (resulting from a Schedule I monthly income of \$4,667.00 minus Schedule J expenditures of \$2,529.00 and proposed plan payments of \$1,525.00).⁸⁶ Barr claimed that she could rightfully withhold this income from her creditors because her Form B22C showed a current monthly income of \$6,531.00 and allowable expenses per the IRS standards (since she was an above-median debtor)⁸⁷ of \$6,607.47, resulting in a disposable income of *negative* \$76.47.⁸⁸ In spite of the fact that the IRS standard expenses listed on Form B22C were more than two-and-a-half times Barr's actual monthly expenses as revealed on Schedule J, the court confirmed the plan as submitted, leaving her unsecured creditors with nothing.⁸⁹

§ 1325(b)(3).

80. The court did not make this express calculation, but this figure results from subtracting Kibbe's Schedule J expenses (\$2,382.00) from Schedule I income (\$5,027.00), which is how "disposable income" had been derived prior to BAPCPA. *See supra* note 35.

81. Again, the court did not expressly provide this calculation, but noted that subtracting Schedule J expenses (\$2,645.00) from "current monthly income" on Form B22C (\$1,068.50) "yields no 'disposable income,' as that term is defined in section 1325(b)(2)." *Kibbe*, 342 B.R. at 414.

82. *Id.* Specifically, Kibbe argued that the § 1325(b)(1)(B) requirement was satisfied by dedicating all of her disposable income (nothing) to unsecured creditors. *Id.* Ultimately, the court rejected this interpretation of the Code and denied Kibbe's proposed plan, holding that "projected disposable income" under § 1325(b)(1)(B) should continue to be based on Schedules I and J rather than on "current monthly income" as defined by §§ 101(10A), 1325(b)(2). *Id.* at 415. The rationale employed by the *Kibbe* court and others with similar holdings is explored in Part II.B.1, *infra*.

83. 341 B.R. 181 (Bankr. M.D.N.C. 2006).

84. *See* § 1325(b)(3).

85. *Barr*, 341 B.R. at 183.

86. *Id.* The court reported the \$513.00 figure. However, this author's math indicates that the court's calculation is off by \$100.00, i.e., the figures listed should net \$613.00. This error is neither important to the conclusion of the court nor affects the usefulness of the case as an example herein.

87. § 1325(b)(3). *See supra* note 65 and accompanying text.

88. *Barr*, 341 B.R. at 183.

89. *Id.* at 186.

From the time the BAPCPA amendments went into effect in October 2005, many courts have been forced to confront the apparent irony of plan proposals such as those in *Kibbe*⁹⁰ and *Barr*⁹¹: that the post-BAPCPA best efforts test sometimes sanctions lesser payments to creditors than did the prior practice of relying on Schedules I and J (notwithstanding the avowal of the Act's proponents to create the opposite effect).⁹² The problem is particularly acute when debtors propose zero payments to unsecured creditors under the new law in spite of actually having surplus income.⁹³

But does BAPCPA really forbid the use of a "crystal ball," forcing courts to close their eyes to a debtor's immediate and future circumstances in favor of a "rear view mirror" perspective? As the cases gather, two distinct answers to this question emerge. Some courts have rejected zero-payment plans like those in *Kibbe* and *Barr*, opting to interpret the Code in a way that preserves pre-BAPCPA practice and seems to align with Congressional intent.⁹⁴ But others read the new Code more literally,

90. It is worth noting that creditors are not the only ones who can suffer from the effect of the "current monthly income" calculation. Debtors who have experienced a recent and dramatic drop in income may find themselves with an historical "current monthly income" average that far exceeds their present earnings. The result is that the only plan these debtors could confirm is one they cannot afford, as determined by a now-unrealistic historical average. *See, e.g., In re Grady*, 343 B.R. 747 (Bankr. N.D. Ga. 2006) (debtor suffered a heart condition which prevented her from working, thereby bringing her actual income well below the "current monthly income" reported on Form B22C); *In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006) (debtor incurred significant and unexpected medical expenses which greatly reduced his actual disposable income in contrast to his historically determined "statutory" disposable income).

91. The dilemma regarding § 1325(b)(3)'s incorporation of means test expenses has been deliberately simplified for the sake of the scope of this Note. Some cases concern the related, but more complex, problem of "double dipping." This problem can arise when a debtor seeks to deduct "allowable expenses" under the means test from § 1325 disposable income notwithstanding the fact that the debtor makes no personal use of such expenses. For example, a debtor may seek to deduct car payments for a vehicle they do not in fact make payments on. *See, e.g., In re McGuire*, 342 B.R. 608 (Bankr. W.D. Mo. 2006). Or the debtor may try to continue to deduct an ownership expense for property they plan to surrender or sell. *See, e.g., In re Edmunds*, 350 B.R. 636, 640 n.2 (Bankr. D.S.C. 2006). Some claim that the language of § 707(b) allows expenses such as mortgage payments to be deducted from disposable income twice. *See, e.g., In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006). Exploring the double dipping phenomenon requires a more detailed analysis of § 707(b) that is not essential to the resolution of this Note's principal question: how to calculate disposable income under § 1325(b)(1)(B) after BAPCPA.

92. As noted by the court in *In re Hardacre*, "Congress's intent with respect to the means test is well known to even the most casual bankruptcy practitioner. The means test was intended to ensure that those who can afford to repay some portion of their unsecured debts be required to do so." 338 B.R. at 725 (internal quotation marks, alteration, and citation omitted).

93. *See supra* note 73.

94. *See, e.g., In re Slusher*, 359 B.R. 290 (Bankr. D. Nev. 2007); *In re Ward*, 359 B.R. 741 (Bankr. W.D. Mo. 2007); *In re LaSota*, 351 B.R. 56 (Bankr. W.D.N.Y. 2006); *In re Edmunds*, 350 B.R. 636 (Bankr. D.S.C. 2006); *In re Risher*, 344 B.R. 833 (Bankr. W.D. Ky. 2006); *In re Fuller*, 346 B.R. 472 (Bankr. S.D. Ill. 2006); *In re Grady*, 343 B.R. 747 (Bankr. N.D. Ga. 2006); *In re McGuire*, 342 B.R. 608 (Bankr. W.D. Mo. 2006); *In re Kibbe*, 342 B.R. 411 (Bankr. D.N.H. 2006); *In re Jass*,

confirming plans of the same type.⁹⁵ I call these the “liberal” and “strict textualist” approaches, respectively,⁹⁶ and explain each in more detail below.

1. *The Liberal Interpretation of the Post-BAPCPA Code*

Despite the fact that, at first glance, the new § 1325 curtails judicial discretion and mandates that disposable income be calculated according to rigid formulae, some courts read the statute in a way that circumvents this result. Such courts often frame their interpretation of the Code by referring to either Congress’s intent in enacting BAPCPA, the general policy underlying bankruptcy law as a whole, or both.⁹⁷ In order to align their holdings with the overall theme of the Act, these courts find that, in spite of BAPCPA’s apparent formalism, the language of Chapter 13 still permits substantially the same practices as before.

Courts striving to achieve this result place great importance on the dueling phrases “disposable income” in § 1325(b)(2) and “*projected* disposable income” in § 1325(b)(1)(B).⁹⁸ Principally, these courts argue that while § 1325(b)(2) now requires a strict, rearward-looking calculation

340 B.R. 411 (Bankr. D. Utah 2006); *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006).

95. *See, e.g., In re Miller*, 361 B.R. 224 (Bankr. N.D. Ala. 2007); *In re Hanks*, 362 B.R. 494 (Bankr. D. Utah 2007); *In re Tranmer*, 355 B.R. 234 (Bankr. D. Mont. 2006); *In re Farrar-Johnson*, 353 B.R. 224 (Bankr. N.D. Ill. 2006); *In re Rotunda*, 349 B.R. 324 (Bankr. N.D.N.Y. 2006); *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wis. 2006); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006); *In re Barr*, 341 B.R. 181 (Bankr. M.D.N.C. 2006).

96. This classification bisects the judicial response. *But see Edmunds*, 350 B.R. at 641–42 (segmenting the approaches taken to post-BAPCPA § 1325 into three groups: “Mechanical Application of the Means Test,” “Means Test is Presumptively Correct,” and “Modified Means Test”). On the other hand, Professor Braucher characterizes the reaction from the bench to BAPCPA’s problems as “venting,” “nihilistic nitpicking,” “torturing the text,” and “subtle subversion.” Braucher, *supra* note 6, at 101–220.

97. *See, e.g., Ward*, 359 B.R. at 744 (“While acknowledging that Congress intended to take away discretion from the courts by enacting the means test, the bankruptcy courts in this district have held that a mechanical application of it in the context of plan confirmation often produces results that could not have been intended by Congress.”); *Edmunds*, 350 B.R. at 643 n.9 (arguing that Congress indicated in the legislative history that “the present bankruptcy system has loopholes and incentives that allow and sometimes even encourage opportunistic personal filings and abuse.” If the mechanical application of the Means Test controlled, without consideration of projected income and expenses, then there would be greater potential for ‘opportunistic personal filings.’”) (citation omitted); *Jass*, 340 B.R. at 417 (“[I]f the Court were to . . . hold that a debtor must always pay unsecured creditors the number resulting from Form B22C, the Court would offend the ‘fresh start’ policies of the Code.”).

98. Emphasis added. The best efforts test under § 1325(b)(1)(B) requires a debtor to pay all “projected disposable income” to unsecured creditors in order to confirm a plan. *See supra* note 33. Section 1325(b)(2) defines “disposable income” “for the purposes of this subsection”; this would seem to control § 1325(b)(1)(B), but § 1325(b)(2) does not include the modifier “projected.” *See supra* text accompanying note 61.

of disposable income,⁹⁹ this can have no effect on § 1325(b)(1)(B) because “projected” disposable income is necessarily forward-looking. As stated by the court in *In re Jass*:

The Court must give meaning to the word “projected,” as it obviously has independent significance. The word “projected” means “[t]o calculate, estimate, or predict (something in the future), based on present data or trends.” Thus, the word “projected” is future-oriented. By definition under § 1325(b)(2), the term “disposable income” is oriented in historical numbers. 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).¹⁰⁰

In addition to highlighting the importance of the word “projected,” courts have found textual authority for their forward-looking approach elsewhere in § 1325(b). For instance, the phrases “to be received” in § 1325(b)(1)(B),¹⁰¹ “to be expended” in § 1325(b)(2),¹⁰² and “as of the effective date of the plan” in § 1325(b)(1)¹⁰³ have all been read to indicate that Congress intended courts to consider the present and future financial status of a debtor without exclusively relying on historical data.¹⁰⁴

Courts following this liberal construction of the post-BAPCPA Code decline to factor the rearward-looking calculation of § 101(10A) into disposable income at all, effectively sidestepping the phrase “current monthly income” as added to § 1325(b)(2).¹⁰⁵ This future-oriented

99. By including the new statutorily defined phrase “current monthly income” in the definition of “disposable income,” § 1325(b)(2) requires courts to examine a debtor’s preceding six months’ income. See *supra* notes 61, 63 and accompanying text.

100. 340 B.R. 411, at 415–16 (Bankr. D. Utah 2006). See also *In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006) (“While Congress could have used the phrase ‘disposable income’ in section 1325(b)(1)(B) and thereby invoked its definition as set forth in section 1325(b)(2), it chose not to do so. Consequently, Congress must have intended ‘projected disposable income’ to be different than ‘disposable income.’”); *In re Kibbe*, 342 B.R. 411, 414 (Bankr. N.H. 2006) (“Had Congress intended ‘projected disposable income’ to be synonymous with section 1325(b)(2)’s ‘disposable income’ Congress could have deleted the word ‘projected’ from section 1325(b)(1)(B) or defined ‘projected gross income,’ rather than only ‘disposable income,’ in section 1325(b)(2).”); accord *In re Slusher*, 359 B.R. 290, 293–300 (Bankr. Nev. 2007); *In re Edmunds*, 350 B.R. at 643; *In re Grady*, 343 B.R. 747, 750–51 (Bankr. N.D. Ga. 2006).

101. See *supra* text accompanying note 33 for the language of § 1325(b)(1)(B).

102. See *supra* text accompanying note 61 for the language of § 1325(b)(2).

103. See *supra* text accompanying note 33 for the language of § 1325(b)(1).

104. See, e.g., *Edmunds*, 350 B.R. at 644; *Hardacre*, 338 B.R. at 723.

105. See, e.g., *In re Fuller*, 346 B.R. 472, 485 (Bankr. S.D. Ill. 2006) (“Whether a debtor is above

perspective has also been employed to justify a departure from the means test expenses and the overall disposable income reported on Form B22C; courts so holding generally view these figures as only presumptively correct.¹⁰⁶

In addition to extrapolating from the term “projected” that the current financial data revealed on Schedules I and J must continue to be used, some courts have seized upon the good faith qualification in § 1325(a)(3)¹⁰⁷ as another source of authority for this viewpoint.¹⁰⁸ For instance, the court in *In re LaSota* opined that bankruptcy judges

do “rough justice,” and need every statutory tool at their disposal to achieve it on a program-wide basis, though they might not achieve justice in every case. Congress’ retention of the “good faith” test, and the presence of the word “projected,” modifying the phrase “disposable income,” are the key tools. BAPCPA did not take those away.¹⁰⁹

or below the median income, parties must determine “projected disposable income” by looking at Schedule I to determine the debtor’s income at the date the petition was filed.”); *Kibbe*, 342 B.R. at 415 (“In a below median case, ‘projected disposable income,’ as used in section 1325(b)(1)(B), is based on a debtor’s current income and expenses as reflected on Schedules I and J.”); *Hardacre*, 338 B.R. at 722 (“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 merely an average of her prepetition income.”).

106. See, e.g., *In re Slusher*, 359 B.R. 290, 299 (Bankr. D. Nev. 2007) (“[T]he language of Section 1325(b)(3) is only a further definition of ‘disposable income’ in the case of above-median debtors, and thus only contributes to the establishment of the presumptive ‘disposable income’ calculation.”); *In re LaSota*, 351 B.R. 56 (Bankr. W.D.N.Y. 2006) (holding that “frugal” above-median debtors whose actual expenses fell below the IRS standard allowances could not retain the excess without paying their creditors in full); *Edmunds*, 350 B.R. at 644 (finding “that the expense allowance provided by § 1325(b)(3) is a forward-looking concept and is not strictly determined by the mathematical calculation of Form B22C”); *In re Gress*, 344 B.R. 919, 922 (Bankr. W.D. Mo. 2006) (holding that, because “Form B22C serves merely as a starting point,” debtors could not confirm a plan based on their Form B22C disposable income of \$81.56 per month while the disposable income revealed by Schedules I & J equaled \$2,182.17); *In re McGuire*, 342 B.R. 608, 615 (Bankr. W.D. Mo. 2006) (“[T]he Form B22C disposable income calculation is merely a starting point, not a determinative number.”); *In re Jass*, 340 B.R. 411, 418 (Bankr. D. Utah 2006) (presuming “that the number resulting from Form B22C is the debtor’s ‘projected disposable income’ unless the debtor can show that there has been a substantial change in circumstances such that the numbers contained in Form B22C are not commensurate with a fair projection of the debtor’s budget in the future”).

107. See *supra* note 29 for the text of § 1325(a)(3).

108. See, e.g., *In re Devilliers*, 358 B.R. 849, 867 (Bankr. E.D. La. 2007) (holding that “strict and technical compliance with [§ 1325(b)] does not necessarily satisfy any debtors’ burden of good faith”); *Edmunds*, 350 B.R. at 648 (“This Court finds that the strict mechanical application of the Means Test does not necessarily satisfy Debtors’ burden of demonstrating good faith in the proposal of their plans, including whether they are devoting sufficient income to their plan.”).

109. 351 B.R. at 61.

2. *The Strict Textualist Approach*

Courts applying a liberal construction to the Code reject plans that depart drastically from pre-BAPCPA practice by leaving money in debtors' pockets at the expense of creditors. Other courts, however, construe § 1325(b) strictly and are thereby willing to confirm the very same plans. While these strict textualist courts may be willing to allow such results, they often do so grudgingly and are quick to point out the apparent irony of their holdings. Such frustration is palpable in statements like the following from the court in *In re Rotunda*:

To allow a debtor with income above the state median to provide for zero payments to unsecured creditors in a chapter 13 plan based on the calculations on Form B22C when, according to Schedules I and J, there remains sufficient funds to pay even a minimal dividend to them, is contrary to the approach taken by this Court for over 20 years in considering chapter 13 plans. Yet . . . it is not for the Court to second guess Congress despite the fact that the statute, as written, may result in a confirmed plan that is contrary to the view expressed by President Bush¹¹⁰

Notwithstanding such sentiments of consternation or surprise, strict textualist courts have been willing to confirm zero-payment plans because they find the plain meaning of the statute compels but one result. These courts argue that the word "shall" in § 1325(b)(3)¹¹¹ leaves no discretion to the bankruptcy bench, making means test expenses and six-month pre-petition income the beginning and the end of a court's inquiry into projected disposable income.¹¹² Furthermore, they argue that Congress

110. 349 B.R. 324, 329 (Bankr. N.D.N.Y. 2006). The court later declared that "[i]f this was not Congress' intent, then it is up to Congress to rectify the situation." *Id.* at 332. *See also In re Guzman*, 345 B.R. 640, 646 (Bankr. E.D. Wis. 2006) (noting that although § 1325(b)(3) may "not perform as advertised," causing trustees, unsecured creditors, and some judges to "long for the 'good old days'" of reviewing Schedules I and J to determine reasonable and necessary expenses, "the mandate of new § 1325(b)(3) is clear"); *In re Alexander*, 344 B.R. 742, 750 (Bankr. E.D.N.C. 2006) ("To veterans of Chapter 13 practice, it runs afoul of basic principles to suggest that a debtor with no disposable income can nonetheless propose a confirmable plan. Yet BAPCPA permits precisely that.").

111. "Amounts reasonably necessary to be expended . . . shall be determined in accordance with [the means test]." § 1325(b)(3) (emphasis added).

112. *See, e.g., In re Farrar-Johnson*, 353 B.R. 224, 228–29 (Bankr. N.D. Ill. 2006) ("Although context may sometimes suggest otherwise, 'shall' typically means 'must.' . . . For an above-median debtor, then, expenses must be calculated under section 707(b)(2); what the debtor lists as expenses on his Schedule J, outrageous or not, is beside the point."); *Guzman*, 345 B.R. at 645 (use of the word "shall" in § 1325(b)(3) "removes all discretion from the bankruptcy court in reviewing the reasonableness of the expenses claimed by the above-median debtor"); *In re Barr*, 341 B.R. 181, 185 (Bankr. M.D.N.C. 2006) ("The use of 'shall' in section 1325(b)(3) is mandatory and leaves no

deliberately sought to limit judicial discretion and that courts are bound to apply the law as written, even in the face of surprising results.¹¹³

Armed with this strict reading of the statute and their own take on Congressional intent, the strict textualist courts confront the arguments advanced by courts advocating a more liberal construction. First, strict textualists are quick to question the proposition that the word “projected” in § 1325(b)(1)(B) permits the continued usage of Schedules I and J over the historical data and means test figures reported on Form B22C.¹¹⁴ The court in *In re Hanks* attacked this approach by finding that such reliance on the word “projected” requires “the unjustifiable deletion of several pages of the Bankruptcy Code in the name of a single word.”¹¹⁵ The court explained,

[E]ven if the word “projected” needs to be given meaning in the abstract to avoid it being mere surplusage, the Supreme Court has made clear that the “preference for avoiding surplusage constructions is not absolute” and can be “offset by the canon that permits a court to reject words as surplusage if inadvertently inserted or if repugnant to the rest of the statute.” . . . [O]ne word clearly should not be elevated in importance so as to gut an entire statutory scheme enacted by Congress.¹¹⁶

Many of the strict textualist courts have also criticized the liberal courts’ argument that the good faith test can override a plan which

discretion with respect to the expenses and deductions that are to be deducted in arriving at disposable income.”).

113. See, e.g., *In re Kolb*, 2007 Bankr. LEXIS 993, at *22–23 (“The statutory language selected by the drafters indicates that Congress deliberately preferred these defined immutable expenses Where Congress wanted to provide any discretion, the statutory language provides for this discretion explicitly, unambiguously, and with defined conditions.”); *In re Hanks*, 362 B.R. 494, 502 (Bankr. D. Utah 2007) (“It bears repeating that Congress’ function is to legislate while the Court’s function is to interpret and apply the law as written instead of a law that the Court might find more logical or reasonable.”); *Farrar-Johnson*, 353 B.R. at 229 (holding that using Schedule J “would undo what Congress sought to accomplish in section 1325(b)(3),” and stating that “[a]lthough the trustee finds this new regime distasteful, Congress evidently knew what it was doing”); *Barr*, 341 B.R. at 185 (claiming that Congress was quite aware that § 1325(b)(3) would require utilizing expenses “that might differ markedly from the debtor’s actual expenses,” and, therefore, did not believe that “the result in this case of applying section 1325(b)(3) as written can be rejected as being absurd”).

114. See, e.g., *In re Miller*, 361 B.R. 224, 235 (“Those courts that argue Congress intended something more when it referred to ‘projected disposable income’ in § 1325(b)(1)(B) fail to address the fact that Congress defined ‘disposable income’ subsequently in § 1325(b)(2).”); *accord Rotunda*, 349 B.R. at 331.

115. 362 B.R. at 499.

116. *Id.*

otherwise conforms to § 1325(b)(1)(B).¹¹⁷ The court in *In re Alexander* pointed out that, even if a debtor's plan differs from what would have been required before BAPCPA, the debtor "is simply complying with the new law," which is not bad faith.¹¹⁸ In summarizing the duty of bankruptcy courts in the post-BAPCPA era (and simultaneously denouncing the liberal approach to the new Code), *Alexander* went on to declare that the courts' "job is to interpret the new statute as clearly written, not to nostalgically preserve the past by seizing on isolated words such as 'good faith' and 'projected' and inflating their meaning beyond justification."¹¹⁹

Finally, in rejecting the liberal construction and applying § 1325(b) strictly, some courts have estimated that the unrealistic¹²⁰ product of post-BAPCPA calculations is not necessarily much worse than the pre-BAPCPA result from Schedules I and J. The *Rotunda* court pointed out that one's circumstances rarely stay exactly the same from month to month—for example, expenses for telephone, electricity, insurance premiums, and taxes are all subject to change.¹²¹ Therefore, "projecting disposable income based on an average of six months' income after certain standard deductions and payment on secured and priority debt is no less realistic than the figures used in Schedules I and J for purposes of proposing a feasible plan."¹²²

117. See *supra* note 108 and accompanying text.

118. *In re Alexander*, 344 B.R. 742, 752 (Bankr. E.D.N.C. 2006). The court added, "So long as the debtor calculates the projected disposable income with specific reference to the new definition of disposable income and commits that projected disposable income to pay unsecured creditors for the applicable commitment period, she is in good faith compliance with the Code." *Id.* See also *Farrar-Johnson*, 353 B.R. at 232 ("The disposable income a debtor decides to commit to his plan is not the measure of his good faith in proposing the plan."); *Barr*, 341 B.R. at 186 ("[W]ith an above-median-income Chapter 13 debtor, the debtor's ability to pay and whether the proposed plan commits all of the debtor's disposable income must be determined under section 1325(b) rather than as an element of good faith under section 1325(a)(3).").

119. *Alexander*, 344 B.R. at 752.

120. See, e.g., *In re Gress*, 344 B.R. 919, 922 (Bankr. W.D. Mo. 2006) (noting that the use of the means test under § 1325(b)(3) "allows debtors to propose plan payments based on a sort of parallel universe, which sometimes has little or nothing to do with their actual situation").

121. 349 B.R. at 331.

122. *Id.* Another court noted that the Form B22C calculations are not really "different than what courts used to do in pre-BAPCPA practice except that courts previously calculated the plan return using the average, estimated, and fluid numbers in Schedules I and J rather than the average, estimated, and partially standardized numbers in Form B22C. And neither method is particularly realistic." *In re Hanks*, 362 B.R. 494, 499 (Bankr. D. Utah 2007).

III. ANALYSIS

The “rough justice” that the *LaSota* court and others seek to fashion is motivated by good intentions and is informed by pragmatism. It is unfortunate that the BAPCPA amendments have clipped these courts’ wings, replacing their careful considerations with inanimate math. It is also unfortunate that the liberal interpretation of § 1325(b) is unsupported by the law. The strict textualists’ construction of § 1325(b) is the correct reading of the current Code.

Courts of both the liberal and strict textual camps reference the supposed intent of BAPCPA’s drafters in the course of their respective interpretations.¹²³ However, the Supreme Court has recently cautioned against utilizing extra-textual sources: “[W]hen 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.”¹²⁴ The Court has further instructed that a statute is only “absurd” if the outcome resulting from its application is “demonstrably at odds with the intentions of its drafters.”¹²⁵ Generally speaking, proving sufficient absurdity for the purpose of a statutory override is extremely difficult; the Supreme Court has been openly hostile to such arguments.¹²⁶ It has also expressed a strong bias against employing legislative histories for any interpretation effort, whether as a precursor to an absurdity argument or otherwise:

As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. . . . [L]egislative history is itself often murky, ambiguous,

123. See *supra* notes 97, 112.

124. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted).

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

126. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) (detailing the Court’s recent animus towards the “absurdity doctrine” and discussing conceptual difficulties with the approach). One commentator has offered this useful advice on the subject:

The Supreme Court lectern is littered with the remains of advocates who have constructed seemingly air-tight arguments as to why Congress could not possibly have intended a particular result only to have those arguments thrashed by skeptical Justices, who question the ability of any onlooker to know what Congress really intended. To have any prospect for success under this approach, the party must point to something very concrete. The best case for a textual override is that the statute is unworkable or dysfunctional if read in accordance with its literal terms, or that it is irrational to the point of absurdity and Congress did not intend for absurd results. To trump text, the degree of irrationality must be severe.

Robert J. Gregory, *Overcoming Text In An Age Of Textualism: A Practitioner’s Guide To Arguing Cases Of Statutory Interpretation*, 35 AKRON L. REV. 451, 472 (2002).

and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in “‘looking over a crowd and picking out your friends.’”¹²⁷

Therefore, any effort to utilize the long and stormy history of BAPCPA in attempting to understand § 1325(b) is inadvisable. Even if it *were* prudent to consult BAPCPA's legislative biography, the venture would be fraught with difficulty. As one court noted, “[t]o the extent legislative history of the 2005 Act can be used to resolve any arguable ambiguity in the statutory language, it is of dubious assistance.”¹²⁸ This is because BAPCPA sorely lacks the kind of reporting and debate which usually attends similar legislative efforts.¹²⁹ Even to the extent that anything can be gleaned from the history of the Act, the “conflicting policies” therein revealed would “not provide a useful guide for interpreting the phrase ‘projected disposable income’ in § 1325(b)(1)(B).”¹³⁰ For instance, some would assert that the § 1325(b)(1)(B) best efforts test seeks to ensure that debtors pay as much as possible to creditors over the course of a Chapter 13 plan;¹³¹ BAPCPA generally appears to further such a goal. But, as noted by the *Hanks* court, other motivations are evident in BAPCPA as well: for instance, the Act makes numerous items deductible from disposable income which, all together, “do not appear to further a goal of maximum repayment to all creditors.”¹³²

127. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

128. *In re Sorrell*, 359 B.R. 167, 176 (Bankr. S.D. Ohio 2007). *See also* Lundin, *supra* note 6 at 71 (“[Practitioners should r]esist the temptation to jump from reading the words to divining intent. Sure there is legislative history But much was lost, much changed and much was added in the translation of rhetoric into BAPCPA.”)

129. The *Sorrell* court explained,

First, there is no joint conference statement because the 2005 Act did not have a conference committee. A conference report is generally the best source of legislative history. Similarly, unlike the 1978 Bankruptcy Code, no report of the floor managers exists which might be given the weight of a conference committee report. The versions of the 2005 Act passed by the Senate and House of Representatives were identical and a conference committee was not required. Even assuming it is appropriate to consider the House Judiciary Report (which represents only a view of members of one committee of one house of the federal bicameral legislature) as a source of legislative history, it often contains a mere recitation of the eventually enacted statutory text and adds little, if any, assistance to the court's efforts in determining Congress's intent.

359 B.R. at 176 (citations omitted).

130. *See In re Hanks*, 362 B.R. 494, 502 (Bankr. D. Utah 2007).

131. *Id.* at 500 (citing *In re Fuller*, 346 B.R. 472, 483 (Bankr. S.D. Ill. 2006)).

132. *Id.* *See also Sorrell*, 359 B.R. at 177 (noting that the phrase “those who can pay, should pay” is used often in reported decisions, and “is often offered . . . as a basis to disregard the actual language

Putting aside for the moment the intentionalist approach as being disfavored by the Supreme Court (and as being a rather blunt instrument when applied to BAPCPA's opaque history), our analysis must turn to the language of the statute itself. As explained in Part II-B-1, *supra*, courts attempting to achieve equitable outcomes under the new Code principally focus on the word "projected" in § 1325(b)(1)(B), claiming that it demonstrates Congress intended courts to look into the future and *not* to rely on the historical and static figures incorporated by §§ 1325(b)(2), (3).¹³³ In so holding, these courts appear to be motivated by the perception that a strict reading leads to untenable results.¹³⁴ However, as a rule, even "harsh" or "awkward" results which follow from a given application of a statute will not be sufficient to override an interpretation which is otherwise commanded by its text.¹³⁵ The correct interpretation of § 1325(b) is that the phrases "projected disposable income" and "disposable income" as used therein are synonyms, and that both are controlled by the strict definition of disposable income in § 1325(b)(2).

Section 1325 is a lengthy provision of the Code. But in all of its 1,243 words, the words "disposable" and "income" appear together exactly twice: once in § 1325(b)(1)(B) as "projected disposable income," and once in § 1325(b)(2) as "disposable income."¹³⁶ Therefore, the definition of disposable income in § 1325(b)(2) must be exclusively designed to control § 1325(b)(1)(B), since § 1325(b)(1)(B) is the only other location of the phrase. As recognized by the *Alexander* court, "If 'disposable income' is not linked to 'projected disposable income' then it is just a floating definition with no apparent purpose."¹³⁷ To put it another way, if the word "projected" in § 1325(b)(1)(B) is capable of singularly redefining

of the enacted legislation," but "neither this (nor any similar) phrase appears in the text of the 2005 Act").

133. See *supra* note 100 and accompanying text.

134. See *supra* note 97 and accompanying text.

135. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005) (what may appear to be an "unintentional drafting gap" does not necessarily authorize judicial correction; even if an omission seems "odd," if it is not "absurd" then "it is up to Congress rather than the courts to fix it"); *Dodd v. United States*, 545 U.S. 353, 359 (2005) ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."); *Lamie v. United States Trustee*, 540 U.S. 526, 533 (2004) (an "awkward, and even ungrammatical" statute may not necessarily be "ambiguous" enough to warrant judicial tinkering).

136. Section 1325(b)(1)(B) mandates that "all of the debtor's *projected* disposable income" be paid to unsecured creditors (emphasis added). Thereafter, § 1325(b)(2) states that, "*For purposes of this subsection*, the term '*disposable income*' means current monthly income . . . less amounts reasonably necessary to be expended . . ." (emphasis added). In turn, § 1325(b)(3) defines "amounts reasonably necessary to be expended" in § 1325(b)(2) as means test expenses for above-median debtors.

137. 344 B.R. at 749.

disposable income, then what is the purpose of the definition in § 1325(b)(2)? The liberal courts' preoccupation with the word "projected" would render the § 1325(b)(2) definition superfluous.

Even if we do not know what BAPCPA's drafters intended to occur in case-by-case applications of § 1325(b), we do know that they intentionally altered the definitions of income¹³⁸ and expenses¹³⁹ under that subsection. In other words, by enacting BAPCPA, we know Congress meant to fire a gun, even if we do not know what it meant to hit. The irony of the liberal approach is that, while claiming to adhere to legislative purpose,¹⁴⁰ it effectively nullifies it. The liberal approach elevates the word "projected" in a way that allows bankruptcy courts to pass over BAPCPA's new formulae in favor of the same nuanced methods practiced prior to the 2005 Act.¹⁴¹ This interpretation of the Code leads to the unlikely conclusion that, in spite of deliberately changing the definition of disposable income, Congress in fact meant for it to stay the same.¹⁴² In fretting over whether Congress's target is struck, liberal courts opt instead to just disarm the gun.

Another problem with the liberal construction is that it wrongfully assumes Congress intentionally included the word "projected" in § 1325(b)(1)(B) and intentionally excluded it from § 1325(b)(2).¹⁴³ The phrases "projected disposable income" and "disposable income" existed in §§ 1325(b)(1)(B), (b)(2) prior to the 2005 Act.¹⁴⁴ However, with the formerly exclusive use of Schedules I and J to determine disposable income,¹⁴⁵ and absent the historical figures now incorporated by BAPCPA, the two phrases meant substantially the same thing.¹⁴⁶ In other

138. Under § 1325(b)(2), "income" was redefined as "current monthly income." See *supra* note 61 and accompanying text.

139. Congress did so by referencing means test expenses for above-median debtors. See *supra* note 65 and accompanying text.

140. See *supra* note 97 and accompanying text.

141. Generally, courts adopting the liberal approach outlined in Part II.B.1, *supra*, read the Code in a way that resurrects the prior exclusive reliance on Schedules I and J.

142. Congress's intent would thus have been for Schedules I and J to continue to be determinative instead of the new measurements of income and expenses now reported on Form B22C per BAPCPA.

143. See *supra* note 100 and accompanying text for cases which find meaning in this supposedly deliberate asymmetry.

144. See *supra* notes 33, 34 and accompanying text.

145. See *supra* note 35.

146. See, e.g., *In re LaSota*, 351 B.R. 56, 60 (Bankr. W.D.N.Y. 2006) ("BAPCPA displaced the earlier view that 'projected disposable income' is indistinguishable from what, in common parlance, is 'excess post-petition income.' When Schedules I and J were the primary source of data, the two terms were synonymous."); *In re Kolb*, 2007 Bankr. LEXIS 993, at *15 ("'Disposable income,' as defined in § 1325(b)(2), was typically applied directly as 'projected disposable income' over the term of a chapter 13 plan pursuant to § 1325(b)(1)(B)."); *In re Brady*, 361 B.R. 765, 769 (Bankr. D.N.J. 2007)

words, since both the definition of “disposable income” and the application of “projected disposable income” considered a debtor’s present and future actual expenses, there was no practical difference in the phrases. The difference, if any, lay dormant.

Moreover, according to some commentators, bankruptcy judges and practitioners were locked out of BAPCPA’s drafting process,¹⁴⁷ leaving its authorship in the hands of lobbyists. It is therefore doubtful that the architects of the new § 1325(b) realized the amendments would stir this latent textual conflict from its slumber. If the asymmetrical phrasing is intentional, it is according to the design of the drafters of the 1984 amendments (which added § 1325(b)(1)(B)),¹⁴⁸ not the drafters of BAPCPA. To the extent that the authors of the 2005 Act gave any thought to the phrasing at all, they probably assumed the unity of definition practiced before the amendments would continue. In fact, there is some direct evidence supporting this assumption elsewhere in the Act. Section 321(c)(1) of BAPCPA added § 1129(a)(15)(B) to Chapter 11, which states in pertinent part:

(a) The court shall confirm a plan only if . . . (15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan . . . (B) the value of the property to be distributed under the plan is not less than the *projected disposable income* of the debtor (*as defined in section 1325(b)(2)*) to be received¹⁴⁹

This subsection indicates that § 1325(b)(2) defines “projected disposable income.” Of course, § 1325(b)(2) does not actually do this: it

(“Under prior practice, the court would simply utilize the debtors’ income and reasonable expenses as listed on Schedules I and J to determine the debtors’ disposable income.”).

147. One commentator fumes,

In contrast to the 1978 legislation, which was crafted with extensive assistance from many of the finest minds in the bankruptcy world, many of the consumer provisions of the 2005 legislation were largely drafted by lobbyists with limited knowledge of real-life consumer bankruptcy practice. It is perhaps a credit to the bankruptcy bar that no true expert in bankruptcy participated in drafting the consumer provisions sought by the financial services industry; apparently the industry did not trust any experienced bankruptcy attorneys, even creditor attorneys, to carry out its mission of defacing the Code. Or perhaps it is just an indication of the arrogance of the bill’s drafters, who throughout the legislative process steadfastly resisted even the smallest technical corrections to their handiwork.

Sommer, *supra* note 5, at 191–92. See also Lundin, *supra* note 6, at 70 (“Especially the consumer parts, this legislation was not written or vetted by the practitioners and scholars usually involved in bankruptcy legislative efforts.”).

148. See *supra* note 33.

149. 11 U.S.C.A. § 1129(a)(15)(B) (2006) (emphasis added).

merely defines “disposable income.” Indeed, the absence of the word “projected” in § 1325(b)(2) is exactly what has spawned the controversy examined by this Note. This passage from § 1129(a)(15)(B) (which was created from scratch by BAPCPA) suggests either that Congress intended the phrases “projected disposable income” and “disposable income” to be synonymous, or that BAPCPA’s drafters were ignorant of the difference.¹⁵⁰ Either way, § 1129(a)(15)(B) critically undermines the idea that the asymmetrical appearance of the word “projected” is meaningful and was meant to alter the given definition of disposable income.

The remaining justifications employed by the liberal approach—such as reliance on the good faith test of § 1325(a)(3)¹⁵¹ or the adoption of a rebuttable presumption in favor of Form B22C disposable income¹⁵²—are particularly weak and fail to overcome the conclusion that the new best efforts test must be read strictly.

One overarching theme of BAPCPA was the replacement of judicial discretion with cold, hard math.¹⁵³ This is precisely what occurred in § 1325(b). Using the good faith test to justify overriding a debtor’s plan proposal and requiring that the debtor conform to pre-BAPCPA practice appears to be little more than an end run around BAPCPA’s black letter mandate. In any case, it is certainly unfair to penalize a debtor for complying with the new, more rigid and formulaic Code. Such compliance is not bad faith.¹⁵⁴

As for the notion that means test expenses under § 1325(b)(3) should only be used as a “starting point”¹⁵⁵ for determining a debtor’s expenses, the idea that Congress intended its legislation to merely serve as a rebuttable presumption is wholly unsupported by the text of the statute and its history. In practice, such a “presumption” will likely be “rebutted” whenever the court prefers a result other than that which is produced by BAPCPA’s math. Like the improper use of the good faith test, this tortured reading appears to be less of a construction of the new law than it is an evasion of BAPCPA’s intended effect.

150. This curious inconsistency was also picked up by the court in *Kolb*, 2007 Bankr. LEXIS 993, at *33 n.18.

151. See *supra* note 108 for cases utilizing the good faith test in this way.

152. See *supra* note 106 for examples of the “rebuttable presumption” standard.

153. See *supra* note 43.

154. See *supra* note 118 for cases in accord.

155. See, e.g., *In re Gress*, 344 B.R. 919, 922 (Bankr. W.D. Mo. 2006); *In re McGuire*, 342 B.R. 608, 615 (Bankr. W.D. Mo. 2006).

It is self-evident that the use of historical data¹⁵⁶ and static, third-party assessments of reasonable expenses¹⁵⁷ will produce a financial profile that frequently differs from a person's true, present circumstances. This new measurement of disposable income will naturally be sometimes lower and sometimes higher than before. Therefore, it should be rather unsurprising that BAPCPA's revision to § 1325(b) often produces "harsh" results—such as when creditors are confronted with debtors who withhold more than their actual expenses, or when debtors cannot confirm plans without committing more income than they have to give. Because these results are so predictable, it cannot be said that they are absurd enough to warrant taking a blue pencil to the Code.¹⁵⁸ While the efforts of courts undertaking a liberal approach may be grounded in sound moral authority and may be animated by a sincere desire to do justice, such efforts are, unfortunately, unsupported by the law. Unless Congress amends the amendment, bankruptcy courts must follow the strict textualist construction of § 1325(b).

For those on the bankruptcy bench who feel slighted by BAPCPA's curtailing of discretion, and for those who resent the purported railroading of the Act by the consumer credit lobby, the strict textualist approach offers some opportunities for satisfaction. For instance, confirming plans which reduce payments to unsecured creditors may be a gratifying way to throw the law back at its "drafters." However, even for those subscribing to such a viewpoint, it must be remembered that the blade cuts both ways: the strict textualist reading of the Code sometimes causes debtors to be effectively foreclosed from relief because they are unable to propose conforming plans.¹⁵⁹ In order to ensure the just treatment of debtors and creditors alike, it is imperative that the law be fixed.

156. I.e., the new historically-rooted definition of "current monthly income" according to §§ 101(10A), 1325(b)(3).

157. I.e., the incorporation of IRS tables via the means test as referenced by § 1325(b)(3) for above-median debtors.

158. This position is contrary to the assertions of some courts that such absurdity does in fact follow from a strict reading of § 1325(b). *See, e.g., In re LaSota*, 351 B.R. 56, 60 (Bankr. W.D.N.Y. 2006); *In re Jass*, 340 B.R. 411, 418 (Bankr. D. Utah 2006).

159. For example, debtors who experience a sharp drop in income before filing would be unable to confirm a plan which did not propose to pay out at levels according to their six-month pre-petition average income. *See supra* note 90. This might mean that they cannot realistically propose any plan at all because the only plan they can confirm is one they can no longer afford (or they will at least have to wait until their rolling average income shrinks over time to match their "actual" current income).

IV. PROPOSAL

As a starting proposition, I cannot resist suggesting that BAPCPA section 102(h) (the portion of the 2005 Act affecting § 1325(b))¹⁶⁰ be repealed in its entirety, returning the best efforts test to an examination of a debtor's actual disposable income per Schedules I and J, subject to a judicial review for reasonableness. While the strict textualist courts correctly interpret § 1325(b), the equitable results achieved by those applying a liberal reading are nonetheless preferable. The pre-BAPCPA best efforts test appears to have been well-suited to give the bankruptcy bench sufficient means to administer the "rough justice" (for debtors and creditors alike) contemplated by the *LaSota* court.¹⁶¹ However, out of respect for the legislative judgment that stricter controls such as the means test are in fact desirable and necessary, I ultimately propose a statutory solution which should preserve the thrust of the initial amendment while avoiding confusion and achieving more just results.

First: The word "projected" should be deleted from § 1325(b)(1)(B), thereby clarifying that the definition of disposable income in § 1325(b)(2) controls the phrase "disposable income" in § 1325(b)(1)(B).¹⁶² Because the phrase "to be received" immediately follows "disposable income" in § 1325(b)(1)(B), it should remain clear that disposable income is oriented in the future even after deleting the modifier, "projected."

Second: The phrase "current monthly income" in § 1325(b)(2) should be changed to "projected monthly income," removing any reference to § 101(10A)—which defines "current monthly income" as a debtor's six-month pre-petition average income.¹⁶³ When the § 707(b) means test is

160. See *supra* note 59.

161. See *supra* text accompanying note 109.

162. Section 1325(b)(1) would then read,

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the 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 *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.

163. The words "to be" should be added immediately thereafter for grammatical correctness. Section 1325(b)(2) would then read,

For purposes of this subsection, the term 'disposable income' means *projected* monthly income *to be* received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended . . .

used as a checkpoint to preclude debtors from filing for Chapter 7 bankruptcy,¹⁶⁴ the § 101(10A) definition of current monthly income employed therein makes sense. In trying to size up a debtor to determine whether she is presently worthy of liquidation bankruptcy, historical data are the best objective indicators of where she stands. Furthermore, the consequences of the means test in the Chapter 7 context are not fatal—the debtor may still proceed with a Chapter 13 plan even if the debtor “flunks” the means test.¹⁶⁵ But in Chapter 13, where the role of the court, trustee, debtor, and creditors is to look years into the future in order to craft a payment plan that best serves everyone’s needs, a focus on the past is inappropriate and counterproductive. It is essential that plan calculations be based on a debtor’s actual, anticipated income in order for the plan to be realistic and successful. Furthermore, for a debtor who is foreclosed from Chapter 7 by the means test, the consequence of flunking the Chapter 13 plan confirmation¹⁶⁶ may be fatal, making bankruptcy relief completely unavailable for an essentially arbitrary reason. Therefore, the phrase “projected monthly income” must be employed to cause courts to consider Schedule I (and any other facts, as appropriate) in assessing *future* income.

Third: The phrase “shall be determined in accordance with [the means test]” in § 1325(b)(3) should be changed to “shall *not exceed amounts* determined in accordance with [the means test].”¹⁶⁷ The effect of this change will be to turn means test expenses into a *cap* for above-median debtors instead of a deduction which these debtors may claim as a matter of right. This will prevent frugal debtors from withholding the difference between their actual expenses and the means test expenses.¹⁶⁸ The reason Congress incorporated means test expenses into § 1325(b) was probably to utilize their capping effect, thereby preventing wealthier debtors from maintaining the luxurious “necessities” they enjoyed up until filing their bankruptcy petition. It probably did not occur to BAPCPA’s drafters that

164. See *supra* notes 47–54 and accompanying text for more on the means test generally and as it is applied to Chapter 7 petitioners.

165. See *supra* note 54 and accompanying text.

166. For example, by no longer earning the kind of income shown by her § 101(10A) historical average. See *supra* note 90 for cases representing such an effect.

167. Section 1325(b)(3) would then read, “Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), *shall not exceed amounts determined in accordance with* subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than . . . [the applicable median].”

168. See *supra* notes 88, 89 and accompanying text for an example of this. Note that for those debtors who happen to have expenses which *exceed* means test expenses and which are in fact necessary (e.g., healthcare expenses, extraordinary work commute), the means test already makes allowances for this. See, e.g., §§ 707(b)(2)(A)(ii)(II), (V).

in those cases where means test expenses actually exceed a debtor's needs, § 707(b) might be relied on as a shield in order to withhold more income from creditors than is necessary. My proposed change to § 1325(b)(3) preserves the probable intent of the amendment (capping expenses) while preventing confusion and injustice.¹⁶⁹

These three changes working in concert will eradicate much of the uncertainty and injustice that has swirled around post-BAPCPA § 1325(b). The definition of disposable income will be clarified, actual projected income will be considered (which will ensure greater plan feasibility, benefiting all), and means test expenses may still be used to hem in the lifestyles of wealthy petitioners—but without being used as a weapon by frugal debtors or others attempting to game the system.

V. CONCLUSION

Given the sprawling nature of the BAPCPA amendments and the underlying complexity of the Bankruptcy Code, it should come as no surprise that inconsistencies and confusion have surfaced as the Act has been applied. But to the extent the new § 1325(b) has produced results which are surprising, ironic, or even harsh, such results are an entirely predictable consequence of delimiting the lifestyle choices of real people through a strict calculus of averages and historical data. They are not “absurd” results, however, and therefore may not be overcome by anything short of a legislative response. While the merits and necessity of BAPCPA may be vigorously debated, the legislature has already spoken on behalf of its constituents, and its judgment deserves deference. BAPCPA and the various cold calculations it calls for must be respected. However, several technical amendments are required in order to remove confusion and to more properly effect the Act's purpose. To this end, my proposed amendments should restore a measure of harmony to the Chapter 13 plan confirmation practice. But until this solution is implemented, courts are left with no choice but to strictly apply the law as written and to stomach the results which follow—even when they are harsh.

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169. The phenomenon of “double dipping” should also be cured by this construction. *See supra* note 90. As means test expenses will no longer be claimable by debtors as a matter of right, but will serve merely as a cap, a debtor should have no sound argument to make for including § 707(b) expenses which are not actually incurred.

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