American Bar Association
www.supremecourtpreview.org

No. 08-998

IN THE

Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE,
Petitioner,

v.

STEPHANIE KAY LANNING,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF PROFESSOR NED W. WAXMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

NED W. WAXMAN
Counsel of Record
THE COLLEGE OF WILLIAM AND MARY
THE MASON SCHOOL OF BUSINESS
P.O. Box 8795
Williamsburg, VA 23187-8795
(757) 221-2859

January 28, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 08-998

JAN HAMILTON, CHAPTER 13 TRUSTEE,
Petitioner,

v.

STEPHANIE KAY LANNING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PROFESSOR NED W. WAXMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE* [1]

Amicus Curiae teaches and writes in the area of bankruptcy law.[2] He is the author of "*Projected*

[1] Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the *amicus curiae* files this brief with the written consent of all parties, which are submitted herewith. No counsel for a party authored this brief in whole or in part. The only person or entity other than the *amicus curiae* making a monetary contribution for the preparation or submission of this brief is the College of William and Mary's Mason School of Business; it has been prepared pro bono.

[2] Ned W. Waxman, J.D., is a Professor at The College of William and Mary's Mason School of Business.

Disposable Income": Legislative Lunacy and Judicial Gyrations, 46 HOUS. L. REV. 867 (2009), Part V of which creates a novel approach to the interpretation of "projected disposable income" in 11 U.S.C. § 1325(b)(1)(B).[3] This new approach is called "**the non-presumptive starting point approach**." He files this brief solely because of the importance of determining the correct interpretation of "projected disposable income," which has been the subject of five differing judicial approaches that have divided the federal courts at every level. He is not predisposed for or against debtors, creditors, or federal or state governmental bodies.

SUMMARY OF ARGUMENT

Amicus curiae supports the Respondent and asserts that, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence showing that the debtor's income or expenses during that period are likely to be significantly different from her income or expenses during the pre-filing period. A forward-looking approach is consistent with both the language of the statute and the intent of Congress. On the other hand, applying the backward-looking mechanical/multiplier approach often produces results that are absurd and manifestly contrary to the legislative intent when the historical figures for "current monthly income" and (for above-median debtors) the means test expenses are significantly

[3] This brief includes verbatim and paraphrased insertions from Ned W. Waxman, "*Projected Disposable Income": Legislative Lunacy and Judicial Gyrations*, 46 HOUS. L. REV. 867 (2009), with the express written permission of the Editor in Chief of the *Houston Law Review*, dated October 22, 2009.

different from the debtor's anticipated actual income or expenses during the plan period. Under such circumstances, the United States Supreme Court requires that the interpretation be avoided if there is a viable alternative approach that is consistent with Congress' intent. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

The legislative history of BAPCPA makes clear that Congress intended (1) to prevent bankruptcy abuse, (2) to make certain that debtors repay creditors the maximum that they can afford, and (3) to shift can-pay debtors from a Chapter 7 liquidation to a Chapter 13 repayment plan. Although, in attempting to create greater uniformity among the bankruptcy judges in confirming Chapter 13 plans, Congress intended to reduce the bankruptcy court's discretion in ascertaining the debtor's ability to pay by creating a mathematical formula to determine "disposable income" where "*possible*," 146 CONG. REC. S11,700 (2000) (insertions by Sen. Grassley) (emphasis added), Congress never intended to abrogate all judicial authority concerning the court's determination of "*projected disposable income*." Therefore, *Amicus curiae* asserts that the non-presumptive starting point approach best reconciles the backward-looking artificially determined components of "disposable income" (11 U.S.C. §§ 101(10A), 1325(b)(2)-(3)) with the forward-looking nature of not only "projected disposable income" (11 U.S.C. § 1325(b)(1)(B)) but also numerous other pertinent Bankruptcy Code provisions, thereby implementing the requirements concerning confirmation of a debtor's Chapter 13 plan in a manner that is consistent with Congress' intentions.

Under the non-presumptive starting point approach, in calculating "projected disposable income," the court uses the debtor's "current monthly income" (the average of the six months before bankruptcy) and the means test expenses (for an above-median debtor) on Form 22C as a starting point, but it then adjusts when the debtor's actual income or expenses during the plan period are likely to be significantly different. Thus, the Tenth Circuit Court of Appeals in the proceedings below reached the correct result but, in one important respect, for the wrong reason. Although, in showing that Congress intended "projected disposable income" to be forward-looking, the Tenth Circuit appropriately adopted many of the same "reasons that projected disposable income is forward-looking and not based on a multiplier of disposable income" that were set forth by *Amicus curiae* in an earlier law review article,[4] the Tenth Circuit's reliance on a presumption is misguided and unnecessary. *In re Lanning*, 545 F.3d 1269, 1278-79, 1282 (10th Cir. 2009). Instead, "the non-presumptive starting point approach" reaches the same result without relying on a presumption that Congress never intended, either expressly or impliedly. Waxman, 46 HOUS. L. REV. at 897-903 (2009).

More specifically, "the non-presumptive starting point approach" relies on the United States Supreme Court's two exceptions to the "plain meaning" rule in situations in which a literal interpretation produces an absurd result, *Lamie v. United States Trustee*, 540

[4] Ned W. Waxman & Justin H. Rucki, *Chapter 7 Bankruptcy Abuse: Means Testing Is Presumptive, but "Totality" Is Determinative*, 45 HOUS. L. REV. 901, 928-33 (2008) (Part VI. "The Debtor's Ability to Pay Under a Chapter 13 Plan") ("B. Reasons that Projected Disposable Income Is Forward-Looking and Not Based on a Multiplier of Disposable Income").

U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted)), or "a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (quoting *Griffin*, 458 U.S. at 571 (1982)) (alteration in original). In addition, this approach relies on 11 U.S.C. § 105(a), which grants the bankruptcy court the authority to "issue any order, process or judgment that is necessary or appropriate *to carry out the provisions of this title*." (emphasis added). Thus, the situation in which the debtor's actual anticipated income and expenses during the plan period are likely to differ significantly from the figures on Form 22C, in a manner showing substantial amounts available to repay the general unsecured creditors, constitutes a fitting example of when it would be nonsensical to restrict the power of the bankruptcy court under 11 U.S.C. § 105(a) to determine "projected disposable income" in the confirmation process. Such a result would deny Chapter 13 plan confirmation to debtors who have the actual ability and are willing to repay their creditors, and it would produce an absurd result that is obviously antithetical to Congress' intent to avoid bankruptcy abuse, to ensure that debtors pay their creditors the most that they can afford, and to shift can-pay debtors to a Chapter 13 repayment plan.

The facts in the proceedings below provide an excellent example. In these circumstances, applying the mechanical/multiplier approach asserted by the Petitioner (Chapter 13 Trustee) would produce a result that Petitioner has admitted the debtor could not afford based on her actual monthly disposable income because her "current monthly income," as defined in 11 U.S.C. §101(10A), was inflated due to

the buyout by debtor's ex-employer during the six-month pre-filing period. *In re Lanning*, 545 F.3d at 1272. However, the debtor proposed a plan that she could afford, which was to make monthly payments of $144 to the general unsecured creditors over a 60-month period, and which the court confirmed over the Petitioner's objection.

In these circumstances, applying the mechanical/multiplier approach to deny confirmation of the debtor's Chapter 13 plan is both absurd and clearly contrary to the intent of Congress because, as stated by the Tenth Circuit, "the mechanical approach advocated by the Trustee would effectively foreclose bankruptcy protection to debtors like Mrs. Lanning . . .", *In re Lanning* 545 F.3d at 1281, who have the actual ability and desire to repay substantial amounts to the their creditors under a Chapter 13 plan. It also would harm creditors by thwarting the attempt by honest debtors to repay creditors the maximum they can afford. However, by using its statutory and equitable powers under 11 U.S.C. § 105(a), the court may determine the debtor's actual ability to pay and thus rule on confirmation of the debtor's plan based on real income and expenses, rather than numbers that are inaccurate and irrelevant. *See Young v. United States*, 535 U.S. 43, 50 (2002) ("[B]ankruptcy courts . . . are courts of equity and apply the principles and rules of equity jurisprudence." (internal quotation marks omitted)).

Thus, "the non-presumptive starting point approach" uses the debtor's "current monthly income" and the means test expenses (for an above-median debtor) as a starting point, thereby giving initial deference to Congress' definition of "disposable income" in 11 U.S.C. § 1325(b)(2)-(3), but it adjusts when the debtor's

income or expenses during the plan period are likely to be significantly different from her income or expenses during the pre-filing period. And it does so without the need to imply a presumption that Congress did not intend.

ARGUMENT

I. Using a Forward-Looking Approach Is Consistent with Both the Language of the Statute and the Legislative History.

A. "Projected Disposable Income" Is a Forward-Looking Term, as Are Many Related Phrases in the Bankruptcy Code.

It is noteworthy that *Merriam-Webster's Collegiate Dictionary* 993 (11th ed. 2003) defines the verb *project* as follows: "to plan, figure, or estimate for the future (~ expenditures for the coming year)." *Black's Law Dictionary* (8th ed. 2004) does not define "project." Thus, the Eighth Circuit Court of Appeals recently explained that "a distinction can be drawn between a debtor's 'disposable income,' which is calculated solely on the basis of historical numbers and regional averages, and a debtor's 'projected disposable income,' which necessarily contemplates a forward-looking number." *In re Frederickson*, 545 F.3d 652, 659 (8th Cir. 2008) *cert. denied*, 129 S.Ct 1630 (2009).

In this regard, the United States Supreme Court requires that courts give meaning to every word in a statute, *Negonsott v. Samuels*, 507 U.S. 99, 106 (1993). As it stated in *TWR, Inc. v. Andrews*, 534 U.S. 19, 31 (2001), "It is a cardinal principal of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous,

void, or insignificant" (internal quotations omitted). The Supreme Court also has emphasized that "Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (quoting *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994)). Therefore, "projected disposable income" cannot mean the same as "disposable income" because the word "projected" would be superfluous. As one bankruptcy court pointed out, "Congress' choice to use both 'projected disposable income' and 'disposable income' in the Code indicates an intent to apply different meanings to the two terms. Given this, it is common sense that while 'disposable income' may explicitly refer to the past, 'projected disposable income' undeniably looks to the future." *In re Slusher*, 359 B.R. 290, 297 (Bankr. D. Nev. 2007). In agreement, the court in *In re Jass*, 340 B.R. 411, 415-16 (Bankr. D. Utah 2006) reasoned as follows: "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)." Therefore, a starting point approach correctly interprets "projected disposable income" as being intended by Congress to refer to the debtor's actual income and expenses during the plan period if those figures have changed significantly.

Also, each of the following three phrases in 11 U.S.C. § 1325(b)(1)(B) is consistent with a starting point approach's forward-looking interpretation of "projected." The first phrase is "*as of the effective date of the plan*" (emphasis added), which generally refers to "the date the order of confirmation becomes

final," and not the date that the Chapter 13 petition was filed. 8 *Collier on Bankruptcy* ¶ 1325.05[2][a] (15th ed. rev. 2009). Hence this phrase is forward looking. The second phrase is "all of the debtor's projected disposable income *to be received* in the applicable commitment period" (emphasis added). Clearly this phrase refers to the disposable income that will be received by the debtor in the future. The third phrase is "*will be applied* to make payments to unsecured creditors under the plan" (emphasis added). Undoubtedly, the verb "will be applied" is in the future tense. Moreover, the Tenth Circuit noted that the courts using the mechanical/multiplier approach pay little attention to these three phrases, thereby apparently rendering them superfluous. *In re Lanning*, 545 F.3d at 1279.

In addition, the following Chapter 13 provisions relating to the debtor's future earnings are consistent with a starting point approach's forward-looking interpretation of "projected." Under 11 U.S.C. § 1306(a)(2), earnings from services that the debtor performs post-petition are included in property of the bankruptcy estate. And under 11 U.S.C. § 1322(a)(1), one of the mandatory requirements of a Chapter 13 plan is "the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." In discussing these two forward-looking provisions, one bankruptcy judge eloquently summarized the problem created by the poorly drafted legislation concerning "projected disposable income" as follows:

> The chapter 13 "disposable income" objection-to-confirmation problem is a classic paradox. The emphasis in §§ 101(10A) and 1325(b) on histori-

> cal income as the threshold for confirming a chapter 13 plan over an objection contradicts the basic premise embodied in §§ 1306(a) and 1322(a)(1) that chapter 13 plans are funded by future income that really exists and runs counter to the only thing that appears to be unambiguous about the 2005 consumer amendments to the Bankruptcy Code: the policy that more debtors should be diverted from chapter 7 liquidations to chapter 13 repayment plans.

In re Pak, 378 B.R. 257, 268 (B.A.P. 9th Cir. 2007) (Klein, J., concurring).

Finally, 11 U.S.C. § 521(a)(1)(B)(vi) requires the debtor to file "a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition."[5] This provision, too, is consistent with a starting point approach's forward-looking interpretation of "projected."

The crux of the problem is that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was drafted egregiously. Congress surely intended that the new definition of "disposable income" would work in the overwhelming majority of cases and thereby create greater consistency among the bankruptcy courts in confirming Chapter 13 plans and ensuring that debtors repay the maximum they can afford. While sometimes it does accurately

---

[5] Note that this provision covers only "any reasonably anticipated increase in income or expenditures," but not reasonably anticipated decreases. It has been suggested that this omission can be cured by enacting a technical amendment covering any reasonably anticipated decrease in income or expenditures. Waxman & Rucki, *Chapter 7 Bankruptcy Abuse*, 45 HOUS. L. REV. at 933 n.150 (2008).

represent the debtor's actual income and expenses during the applicable commitment period, in many other cases it is not an accurate predictor because it is based on historical income and expenses that might have changed significantly. And when it is not an accurate predictor, these poorly drafted definitions of "disposable income," "current monthly income," and the means test expenses often produce absurd results that dramatically conflict with the intentions of Congress. Several good examples are when the debtor has lost employment, has obtained a more lucrative job, has stopped receiving substantial workers' compensation benefits, has surrendered or intends to surrender collateral that cancels a secured debt, has suffered additional medical expenses; or when the debtor will complete repayment of a 401(k) loan in the early months of a Chapter 13 plan; or when Form 22C shows a negative disposable income figure but the debtor's actual income minus actual expenses shows actual substantial disposable income that will benefit the general unsecured creditors. In all of these situations, applying a forward-looking approach allows the court to confirm a Chapter 13 plan providing for the repayment to creditors of the maximum the debtor can afford.

In applying a forward-looking approach, the Eighth Circuit Court of Appeals explained: "If we read the word 'projected' out of 11 U.S.C. § 1325(b)(1)(B) and rely solely on the calculation of 'disposable income' on Form 22C, the outcome involves anomalous, and perhaps even absurd, results." *In re Frederickson*, 545 F.3d at 659.

B. Calculating "Projected Disposable Income" Based on Income and Expense Figures That Are Significantly Different from the Debtor's Anticipated Income or Expenses During the Plan Period Often Leads to Absurd Results.

Measuring ability to pay by income or expense figures that are *no longer relevant* is absurd and in clear contravention of Congress' stated goals. Accordingly, this brief agrees with the partial quotation, in the Brief For The National Association of Consumer Bankruptcy Attorneys as *Amicus Curiae* in support of Neither Party at 27, from *Kelly v. Washington*, 479 U.S. 36, 43 (1986), which states in full: "But the text is only the *starting point* (emphasis added). As Justice O'CONNOR explained last Term: 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'" (citations omitted).

Given the object and policy of ensuring that debtors repay the maximum they can afford under a Chapter 13 plan, which under any intelligible design must be based on the debtor's future expected actual income minus actual expenses, resorting instead to historical artificially determined income and expenses that differ significantly is patently absurd. In fact, it might be considered the classic example of "absurd" in the context of bankruptcy law. By definition, it is impossible to determine the debtor's ability to make Chapter 13 plan payments during the next 60 months based on income and expenses figures that are not accurate predictors of the debtor's actual future budget. Not only is this result absurd, it penalizes honest debtors and harms general un-

secured creditors, who will not be paid if a Chapter 13 plan is not confirmed. It not only is clearly at odds with the goals of BAPCPA but also with the primary goal of the bankruptcy laws throughout history, which is to give the honest debtor a fresh start. In this regard, the Honorable W. Homer Drake, Jr., wrote: "The bankruptcy laws have been described as humane by a no less prestigious institution than the Supreme Court of the United States, because these laws are designed to benefit both honest debtors and their creditors." W. Homer Drake, Jr., "*Bankruptcy Practice For the General Practitioner*, 3d ed., Vol. 1, § 1:1 (Thomson West 2002) (citing *Local Loan v. Hunt*, 292 U.S. 234 (1934); *Stellwagon v. Clum*, 245 U.S. 605 (1918)). Unfortunately, a backward-looking interpretation of "projected disposable income" has the opposite effect on both debtors and creditors, which is truly an absurd result. The court in *In re Spurgeon* opined:

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

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

Other courts agree, and the opinion in *In re Wilson*, 397 B.R. 299, 311 (Bankr. M.D.N.C. 2008) sets forth several cases that view the mechanical/multiplier approach as producing an absurd result. For example, the Tenth Circuit in the proceedings below highlighted the bankruptcy court's reasoning that the mechanical/multiplier approach "leads to absurd results that are at odds with both congressional purpose and common sense." *In re Lanning*, 545 F.3d at 1273. Similarly, the bankruptcy court in *In re Purdy*, 373 B.R. 142, 150 (Bankr. N.D. Fla. 2007), stated: "The purportedly 'literal' application of the statutory language advocated by the 'multiplier' interpretation is at odds with the manifest intent of Congress. . . .[and] produces an absurd result." Another example is *In re Edmondson*, 363 B.R. 212, 217 (Bankr. D.N.M. 2007), in which the court concluded: "Here, it appears that taking a plain meaning approach which results in strict adherence to Form [ ]22C would be contrary to the structure and purpose of the Bankruptcy Code as a whole and would lead to absurd results."

C. Examples of Avoiding Absurd Results by Applying a Forward-Looking Approach

The Supreme Court has stated unambiguously: "It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin*, 458 U.S. at 575. Thus, in accordance with the Court's guidance, the majority of courts have applied a forward-looking

approach to "projected disposable income" to avoid an absurd result.

For example, in the case of *In re Johnson*, the debtors' "current monthly income" was artificially inflated due to workers' compensation payments to the wife for a hand injury during the six-month period before bankruptcy. The payments had ended prior to the bankruptcy filing. The Trustee objected to confirmation of the debtors' Chapter 13 plan solely because of the inflated "current monthly income" figure on Form 22C, even though the plan proposed to pay $162,000 to the general unsecured creditors, which constituted 73% of their claims. The bankruptcy court applied a forward-looking approach and confirmed the plan based on the debtors' amended Form 22C, using anticipated actual income and expenses during the plan period, while adhering to the changes in the income inclusions and exclusions in 11 U.S.C. § 101(10A). The case currently is pending in the Seventh Circuit Court of Appeals. *In re Johnson*, 400 B.R. 639, 643, 651 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom. Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009).

In a case involving the expense side, the multiplier approach would have allowed deductions for monthly loan repayments of $1134.79 to the debtor's 401(k) plan even though the loan would have been completely repaid in the twenty-fourth month of the sixty-month Chapter 13 plan. The bankruptcy court posed the hypothetical of a situation in which the debtor has only one monthly payment remaining on a 401(k) loan at the time she filed her Chapter 13 sixty-month plan. The court stated that it would "def[y] logic" if, "[s]tarting in the second month of the plan, a debtor would be able to pocket the amount of the

401(k) loan repayment free from the Chapter 13 plan and any claims of her prepetition creditors." The court denied confirmation of the plan, and the Fifth Circuit affirmed. *In re Nowlin*, 366 B.R. 670, 675 (Bankr. S.D. Tex 2007), *aff'd sub nom. Nowlin v. Peake* (*In re Nowlin*), 576 F.3d 258 (5th Cir. 2009).

In another case on the expense side, *In re Turner*, an above-median debtor deducted on Form 22C the monthly mortgage payment of $1521 for his residence, which he intended to surrender to the mortgagee, and which would result in the cancellation of the debt before he would be required to make any payments to the unsecured creditors under a confirmed Chapter 13 plan. *In re Turner*, 574 F.3d 349 (7th Cir. 2009). In the context of a Chapter 7 case, the overwhelming majority of courts have held that this means test expense for "all amounts scheduled as contractually due to secured creditors" is deductible even if the debtor intends to surrender the collateral to the secured creditor. 11 U.S.C. § 707(b)(2)(A)(iii)(I); *In re Kelvie*, 372 B.R. 56, 61 (Bankr. D. Idaho 2007) (citing *In re Haman*, 366 B.R. 307, 316 (Bankr. D. Del. 2007). However, in a Chapter 13 case in which the debtor has surrendered or intends to surrender the collateral to the secured creditor in cancellation of the debt, it would be absurd to allow a deduction of the home mortgage payments for the purpose of determining the debtor's "disposable income" because the expense is neither reasonable nor necessary and such payments will never "be expended." Therefore, "[m]ost courts have not allowed the deduction in Chapter 13 cases when the proposed plan provided for surrender of the collateral." *In re Spurgeon*, 378 B.R. 197, 201 (Bankr. E.D. Tenn. 2007). However in the *Turner* case, the bankruptcy court used the multiplier approach and confirmed the plan, but the

Seventh Circuit Court of Appeals, adopting the presumptive starting point approach, reversed based on the following rationale:

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

In re Turner, 574 F.3d at 356.

Similarly, in *In re Vernon*, the court denied a deduction for secured debt payments on surrendered property and explained the different policy goals of applying the means test as a presumption of abuse in Chapter 7 versus using the means test deductions in Chapter 13 "to determine the maximum a debtor could pay under a Chapter 13 plan." *In re Vernon*, 385 B.R. 342, 347 (Bankr. M.D. Fla. 2008), *aff'd*, No. 2:08-cv-280, (M.D. Fla. Aug. 3, 2009) (citations omitted). Yet, Form 22C provides for the monthly secured debt deduction over the plan period even when it will never be paid.

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

> [T]he federal courts produced a bankruptcy form [22C][6] that is supposed to measure repayment

[6] Official Bankruptcy Form 22C is a "Statement of Current Monthly Income and Calculation of Commitment Period and

> ability. But it's my understanding that this form actually directs consumers to claim deductions for expenses a debtor may not even have. That certainly wasn't the intent of the law. The form legitimizes gaming of the law, reduces the integrity of the system, and ultimately undermines the reforms we were trying to accomplish.[7]

Consequently, in many instances, the result under the multiplier approach will thwart Congress' goal of ensuring that debtors who actually have the ability to repay creditors do so in a Chapter 13 repayment plan.

D. The Legislative History Shows Congress' Intent to Prevent Bankruptcy Abuse and Ensure That Debtors Repay Creditors the Maximum They Can Afford, and Congress Never Intended to Abrogate All Judicial Authority Concerning the Determination of "Projected Disposable Income."

Among the primary purposes of BAPCPA were the following: (1) to prevent bankruptcy abuse; (2) "to ensure that debtors repay creditors the maximum they can afford," H.R. REP. NO. 109-31, pt. 1, at 2 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 89; and (3) to shift can-pay debtors to Chapter 13 based on their actual ability to pay. In this regard, the First Circuit Court of Appeals recently stated: "The Bank-

---

Disposable Income" that must be completed by every Chapter 13 debtor.

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

ruptcy Abuse Prevention and Consumer Protection Act of 2005 ('BAPCPA') was enacted in response to an upward trend in consumer bankruptcy filings and concerns that bankruptcy relief was 'too readily available' and 'sometimes used as a first resort, rather than a last resort.'" *In re Rudler*, 576 F.3d 37, 40 (1st Cir. 2009) (quoting H.R. REP. NO. 109-31, pt. 1, at 4, reprinted in 2005 U.S.C.C.A.N. 88, 90).[8] More specifically, Senator Charles Grassley explained in the legislative history of BAPCPA:

> What we are trying to do is fix a bankruptcy system that has gone awry, where individuals who have the ability to repay their debts don't do so, and the rest of us are left holding the bag.
>
> What we have tried to do with this bill is inject some fairness into the system, whereby people who have assets and the ability to repay back their debts go into a chapter 13 repayment plan, and people who do not have any means and no ability to repay go into chapter 7.

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

Consequently, a forward-looking approach that gives initial deference to Congress' new definition of "disposable income," but adjusts when the debtor's actual income or expenses are likely to be different during the plan period, most effectively carries out the intentions of Congress.

This brief does not dispute that, in implementing these stated policies, Congress attempted to create a

---

[8] *Morse v. Rudler* (*In re Rudler*), 576 F.3d 37, 40 (1st Cir. 2009) (quoting H.R. REP. NO. 109-31, pt. 1, at 4, *reprinted in* 2005 U.S.C.C.A.N. 88, 90).

mathematical formula to determine "disposable income" that would result in greater uniformity among the bankruptcy judges in confirming Chapter 13 plans.[9] Thus, in cases where "current monthly income" minus the means test expenses approximates the debtor's actual income and expenses during the plan period, the bankruptcy court's discretion is reduced innocuously. However, Congress never intended to abrogate entirely the discretion of the bankruptcy court to determine the debtor's ability to repay creditors under a Chapter 13 plan. Therefore, in circumstances in which the debtor's actual income or expenses are likely to differ significantly during the plan period, the multiplier approach often produces absurd results that are in conflict with the stated goals of BAPCA. In this regard, the Supreme Court has instructed as follows: "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin*, 458 U.S. at 575. Thus, a starting point approach, supported by all of the relevant forward-looking provisions, provides an alternative interpretation that is consistent with the legislative purposes. Moreover, 11 U.S.C. § 105(a) provides the court with the power "to carry out the provisions of [the Bankruptcy Code]", which includes the power to reconcile the backward-looking and forward-looking provisions of 11 U.S.C. § 1325(b) in order to confirm Chapter 13 plans in situations where the debtor has substantial

---

[9] *See* Petitioner's brief at 29 quoting the following excerpt from Senator Grassley's insertion into the Congressional Record in 2000 that "[i]t is intended that there be a uniform, nationwide standard to determine disposable income used in chapter 13 cases based, on means test calculations." 146 CONG. REC. S11,703 (2000).

actual disposable income to pay to the general unsecured creditors. Any other conclusion would fly in the face of the legislative intent to "inject some fairness into the system, whereby people who have assets and the ability to repay back their debts go into a chapter 13 repayment plan." 151 CONG. REC. S2469 (daily ed. Mar. 10, 2005) (statement of Sen. Grassley).

In this context, Petitioner-Trustee's brief at 28 in this case quotes a sentence that is helpful from the 1999 Senate Judiciary Committee Report (portions of which were inserted into the Congressional Record) accompanying the 2000 (unenacted) Act:[10]

> HR 2415 is the culmination of these efforts and is intended to both remove unequivocally the bankruptcy court's discretion with regard to whether a debtor with ability to pay should be dismissed from chapter 7, and to restrict as much as possible reliance upon judicial discretion to determine the debtor's ability to pay.

146 CONG. REC. S11,700 (2000) (Statement of Sen. Grassley).

---

[10] "146 CONG. REC. 26,462 (2000). The 1999 Senate Judiciary Committee Report originally accompanied the unenacted Bankruptcy Reform Act of 1999. During the Senate's debate on the Bankruptcy Reform Act of 2000 Conference Report, Senator Grassley inserted portions of the 1999 Senate Judiciary Committee Report into the Congressional Record to provide an explanation of the 2000 Conference Report. The text of these insertions appears in the Congressional Record as seven-point font, rather than the standard eight-point font, indicating that they were contained in a document inserted into the Congressional Record by Senator Grassley. LAWS AND RULES FOR PUBLICATION OF THE CONGRESSIONAL RECORD, available at http://www.gpoaccess.gov/crecord/laws-rules.pdf."

Waxman & Rucki, "*Chapter 7 Bankruptcy Abuse*," 45 HOUS. L. REV. at 910 n.44.

While, for purposes of the means test presumption in a Chapter 7 case, the bankruptcy court's discretion has been removed (although, if the presumption does not exist or is rebutted, the court is required in its discretion to consider whether the totality of the circumstances demonstrates abuse of Chapter 7 under 11 U.S.C. § 707(b)(3)(B)).

However, the language quoted above concerning the court's discretion to determine the debtor's ability to pay necessarily is referring to a Chapter 13 plan, and that judicial discretion is "*restrict[ed] as much as possible*." 146 CONG. REC. S11,700 (2000) (insertions by Sen. Grassley) (emphasis added). Therefore, this excerpt from the legislative history is completely consistent with a forward-looking approach that, in computing "disposable income," starts with current monthly income and the means test expenses but adjusts when that is *not possible* to determine the debtor's ability to pay because the debtor's income or expenses during the plan period are likely to differ significantly.

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

The starting point approach applied by the Tenth Circuit in the proceedings below generally is described as reading a presumption into 11 U.S.C. § 1325(b) even though Congress did not include an express presumption in the literal language of the statute.[11] However, "it is a general principle of statu-

[11] *See Nowlin v. Peake* (*In re Nowlin*), 576 F.3d 258, 263 (5th Cir. 2009); *Hamilton v. Lanning* (*In re Lanning*), 545 F.3d 1269, 1282 (10th Cir. 2008), *cert. granted*, 130 S. Ct. 487 (2009) (No. 08-998); *In re Slusher*, 359 B.R. 290, 299–300 (Bankr. D. Nev. 2007); *In re Jass*, 340 B.R. 411, 418–19 (Bankr. D. Utah 2006).

tory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Inasmuch as Congress used the word "presume" in 11 U.S.C. § 707(b)(2)(A)(i) to create an express presumption of abuse under the means test, but did not use the word "presume" or "presumption" in 11 U.S.C. § 1325(b) for the definition of "disposable income," it is clear that an express presumption does not exist for the latter. In agreement, the Ninth Circuit Court of Appeals stated: "BAPCPA's changes to the Bankruptcy Code made it clear that Congress knows how to create a presumption. *See* 11 U.S.C.A. § 707(b)(2) (stating when the court shall presume abuse exists). Congress could have included a presumption in § 1325(b)(1)-(2), but it did not." *Maney v. Kagenveama* (*In re Kagenveama*), 527 F.3d 990, 997 (9th Cir. 2008), *amended by In re Kagenveama*, 541 F.3d 868, 874 (2008).

The next logical question is the following: Did Congress intend to create an implied presumption in 11 U.S.C. § 1325(b) that "a debtor's 'disposable income' calculated under 11 U.S.C. § 1325(b)(2) and multiplied by the applicable commitment period is presumptively the debtor's 'projected disposable income' under 11 U.S.C. § 1325(b)(1)(B)," unless it is rebutted by evidence of significant changes in the debtor's present or future actual income or reasonably necessary expenses? *In re Nowlin*, 576 F.3d at 266. Many post-BAPCPA cases and commentaries, including the Eighth Circuit Court of Appeals in *In re Frederickson*, express the notion that

Congress intended to create a rigid mathematical formula for disposable income, thereby "reduc[ing] the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor's income and expenses." *In re Frederickson*, 545 F.3d 652, 658 (8th Cir. 2008) (citing Richard S. Stolker, *Debtor's Perspective: BAPCPA Issues*, 40 MD. B.J. 22, 23 (2007)), *cert. denied*, 129 S. Ct. 1630 (2009). In this regard, although Judge Wedoff refers to the starting point approach as "the presumptive approach" in the caption to Part 3.b of the bankruptcy court's opinion in *In re Johnson*, he also states the following: "The primary problem with the presumptive approach is the statutory language. Nothing in § 1325(b) *creates or implies* a presumption of correctness in the average income from the six months before bankruptcy." *In re Johnson*, 400 B.R. 639, 648 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom. Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009) (emphasis added). Even the Tenth Circuit Court of Appeals, in applying the presumptive starting point approach, acknowledged the problem of implying a presumption when it stated: "We think that these textual problems [relating to the multiplier approach giving little heed to 'as of the effective date of the plan,' 'to be received in the applicable commitment period,' and 'will be applied to make payments'] . . . outweigh the concern about implying a presumption." *In re Lanning*, 545 F.3d at 1279. As explained below, implying a presumption is unnecessary and misguided, and the same result can be achieved based on two other sound legal theories.

III. The Supreme Court's Two Exceptions to the "Plain Meaning" Rule

Therefore, instead of attempting to imply a presumption that Congress obviously did not intend, the courts using a starting point approach to determine "projected disposable income" should rely on the Supreme Court's guidelines for statutory interpretation. More specifically, the Supreme Court consistently has recognized two exceptions to the general rule of applying the plain meaning of a statute. One exception is when a literal application will produce an absurd result. As the Court stated in *Lamie v. United States Trustee*, "[i]t is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (quoting *Hartford Underwriters*, 530 U.S. at 6). The other exception is "in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enters.*, 489 U.S. at 242 (quoting *Griffin*, 458 U.S. at 571).

With respect to 11 U.S.C. § 1325(b), both exceptions apply because its literal language often produces absurd results that blatantly conflict with the intentions of Congress to reduce bankruptcy abuse and "ensure that debtors repay creditors the maximum they can afford." H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89. The fact that there are now six differing approaches to "projected disposable income" that have ensued from the amendments to 11 U.S.C. § 1325(b) in 2005 con-

stitute incontrovertible evidence that the new definition of "disposable income" and the absence of a definition for "projected disposable income" exemplify the rare case in which the intention of Congress, rather than the strict language of the statute, should control. The language is *irreconcilable* because "the term 'disposable income' demands a look back and the term 'projected' requires a look forward . . . . One must give way to the other, or the courts must fashion an interpretation that gives the greatest meaning to both." *In re Lanning*, 380 B.R. 17, 23 (B.A.P. 10th Cir. 2007). Thus, when "disposable income" does not accurately reflect the debtor's actual income or expenses, courts should apply a forward-looking approach that utilizes the exception enunciated by the Supreme Court to avoid an absurd or anomalous result that never was intended by Congress.[12] Courts should not attempt to utilize a phantom presumption that was neither expressed nor implied. Rather, courts should follow the Supreme Court's guidance in *Griffin* in order to avoid an interpretation of the statute that produces absurd

---

[12] Thomas J. Izzo, Comment, *Projecting the Past: How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Befuddled § 1325(b) and "Projected Disposable Income,"* 25 EMORY BANKR. DEV. J. 521, 543 (2009) ("While the Starting Point interpretation produces balanced and reasonable outcomes, the Mere Multiplication construction has the tendency to produce absurd results that are contrary to a sensible bankruptcy system."); Matthew Showel, Student Article, *Calculating Projected Disposable Income of an Above-Median Chapter 13 Debtor*, 21 LOY. CONSUMER L. REV. 407, 427-28 (2009) ("It is not reasonable to interpret the statute in a way that leads to nonsensical, counterproductive results when an interpretation that is at least as viable is available. Such a reading suggests that Congress intended nonsense when enacting the statu[t]e. That is not a reasonable supposition.").

results if there exist other interpretations consistent with Congress' intent. *Griffin*, 458 U.S. at 575.

IV. The Bankruptcy Court's Power Under 11 U.S.C. § 105(a)

Bankruptcy Code § 105(a) states: "The court may issue any order, process, or judgment that is necessary or appropriate *to carry out the provisions of this title*." 11 U.S.C. § 105(a) (emphasis added). This broad grant of authority to the court is another sound legal basis on which a bankruptcy judge may use the non-presumptive starting point approach to rule on the confirmation of a debtor's Chapter 13 plan, while also reconciling the conflicting forward-looking and backward-looking provisions of § 1325(b) when the debtor's income or expenses during the plan period are likely to be significantly different from her income or expenses during the pre-filing period.

The Third Circuit emphasized:

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

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

However, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). As explained by the First Circuit Court of Appeals: "[S]ection 105(a) does not provide bankruptcy courts with a roving writ, much less a free hand. The authority bestowed thereunder may be invoked only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code." *Jamo v. Katahdin Fed. Credit Union (In re Jamo)*, 283 F.3d 392, 403 (1st Cir. 2002).

Therefore, inasmuch as the right of an individual who is eligible under 11 U.S.C. § 109(e)[13] to seek Chapter 13 relief is an identifiable right conferred within the Bankruptcy Code, it is evident that 11 U.S.C. § 105(a) provides the bankruptcy court with the appropriate power to apply the non-presumptive starting point approach and thereby reconcile the conflicting language in 11 U.S.C. § 1325(b) concerning confirmation of a debtor's Chapter 13 plan.

---

[13] Section 109(e) provides as follows:

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

11 U.S.C. § 109(e) (2009).

This express power that Congress has conferred on the bankruptcy court under 11 U.S.C. § 105(a), as well as the Supreme Court's two exceptions to the plain language principle of statutory interpretation, enable the court to apply a starting point approach without resorting to the machination of an implied presumption that Congress did not intend. Therefore, when the debtor's income or expenses during the plan period are likely to be significantly different from her income or expenses during the pre-filing period, applying the non-presumptive starting point approach is the most appropriate course of judicial action for the following reasons. Using its express statutory power under 11 U.S.C. § 105(a) and its inherent power as a court of equity, the bankruptcy court will carry out the applicable Bankruptcy Code provisions in a manner that avoids an absurd result or a result that is "demonstrably at odds with the intentions of its drafters," *United States v. Ron Pair Enters.*, 489 U.S. at 242 (quoting *Griffin*, 458 U.S. at 571), which undeniably are "to ensure that debtors repay creditors the maximum they can afford." H.R. REP. NO. 109-31, pt. 1, at 2 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 89.

V. Excusal from Filing Schedule I, and Resetting the Six-Month Period to Determine "Current Monthly Income" Is Not an Exclusive Approach

Bankruptcy Code § 101(10A)(A)(ii) allows the court the discretion to reset the six-month period for the determination of current monthly income if the debtor does not file Schedule I. In this regard, it is important to note that 11 U.S.C. § 521(a)(1)(B)(ii) requires the debtor to file a schedule of current income (Schedule I) and a schedule of current ex-

penses (Schedule J), "unless the court orders otherwise." Under 11 U.S.C. § 101(10A)(A)(ii), the reset six-month period ends on "the date on which current income is determined by the court," instead of "on the last day of the calendar month immediately preceding the date of the commencement of the case" (the norm). 11 U.S.C. § 101(10A)(A)(i). It appears to be used very infrequently and in circumstances involving a dramatic change in the debtor's income, such as the loss of a job shortly before or after the filing of the bankruptcy petition. This provision may work only in favor of the debtor, and it involves only the income component of disposable income.

Generally, the debtor files a motion to excuse the requirement for filing Schedule I, and to set an alternative date for determining current monthly income. *See In re* Hoff, 402 B.R. 683, 685 (Bankr. E.D.N.C. 2009).[14] For example, in two recent Chapter 13 cases, the debtors lost their jobs shortly before bankruptcy resulting in a significant loss in income, and both were receiving unemployment benefits at the time of their motions to reset the six-month period for calculating current monthly income. *In re Dunford*, 408 B.R. 489, 491-92 (Bankr. N.D. Ill. 2009); *In re Hoff*, 402 B.R. at 685 (The husband and wife were joint debtors. The husband lost his job, and the wife was unemployed. *Id*.). In both cases, the courts found

[14] Section 521(i)(1) states that "if an individual debtor in a voluntary case under chapter 7 or 13 fails to file [schedules I and J] required under [11 U.S.C. § 521(a)(1)(B)(ii)] within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition." 11 U.S.C. § 521(i)(1). However, this requirement is qualified by the language "unless the court orders otherwise." 11 U.S.C. § 521(a)(1)(B).

that the motion was filed in good faith based on such factors as the debtors' financial situation, education, experience, initiative in seeking employment, and the particular six-month period requested for determining current monthly income. *In re Dunford*, 408 B.R. at 496; *In re Hoff*, 402 B.R. at 685-87. Also, in both cases, the courts excused the filing of Schedule I and reset the six-month period for determining the debtors' current monthly income. *In re Dunford*, 408 B.R. at 497 (resetting the period by two months, as requested by the debtor); *In re Hoff*, 402 B.R. at 687 (resetting the period by four months, but not six months as the debtors had requested).

As a practical matter, it is helpful to note that 11 U.S.C. § 1324(b) requires the confirmation hearing to be held not later than 45 days after the date of the meeting of creditors under 11 U.S.C. § 341(a).[15] Also, Federal Rule of Bankruptcy Procedure 2003(a) requires that the meeting of creditors in a Chapter 13 case be held not later than 50 days after the order for relief. Fed. R. Bankr. P. 2003(a).

Inasmuch as these time limitations are quite restrictive, and inasmuch as this approach to calculating "projected disposable income" does not cover

---

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

8 COLLIER ON BANKRUPTCY, ¶ 1324.02[2] (15th ed. rev. 2009).

significant changes in the debtor's expenses,[16] it seems clear that resetting the six-month period to determine the debtor's "current monthly income" cannot possibly cover as many situations as a forward-looking approach. More specifically, the overwhelming weight of authority applies a forward-looking approach that takes into account likely changes in actual income *or* expenses during the plan period, rather than only the debtor's income during the reset six-month period. These courts implicitly have not construed 11 U.S.C. § 101(10A)(A)(ii) as the exclusive method by which the court may apply income figures that more accurately represent the debtor's actual future income than the average monthly income for the six months prior to bankruptcy in order to determine "projected disposable income." *But see In re Dunford*, 408 B.R. at 495 (Bankr. N.D. Ill. 2009)

---

[16] Petitioner's brief at 54 asserts that, under the multiplier approach, there is a possible exception on the expense side when it can be demonstrated that there are "special circumstances" that could rebut the means test presumption of abuse in Chapter 7 (e.g., a serious medical condition) "that justify *additional* expenses . . . for which there is no reasonable alternative." 11 U.S.C. § 707(b)(2)(B) (which is incorporated into the expense component of "disposable income" by 11 U.S.C. § 1325(b)(3) for an above-median debtor) (emphasis added). However, the major problem with applying the "special circumstances" provision in a Chapter 13 case is that it does not cover decreased expenses, such as when the debtor has surrendered or intends to surrender the collateral in cancellation of the debt that it secures, or when the debtor will complete repayment of a 401(k) loan in the early months of a Chapter 13 plan. Thus, in many instances, the "special circumstances" provision cannot be applied to avoid a gross overstatement of the debtor's actual expenses during the Chapter 13 plan period, thereby rendering the plan not confirmable even though the debtor has substantial actual disposable income available to pay the general unsecured creditors.

(favoring the interpretation that resetting the six-month period is exclusive). This brief expressly asserts that this approach is not the exclusive method and that the effect of treating it as exclusive in many instances would be to thwart Congress' intent to shift can-pay debtors to a Chapter 13 repayment plan.

CONCLUSION

In calculating the debtor's "projected disposable income" during the Chapter 13 plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period. This conclusion is supported by the forward-looking nature of the word "projected" as well as many other forward-looking phrases in the Bankruptcy Code concerning Chapter 13 plan confirmation. Furthermore, a backward-looking approach to determining "projected disposable income" often leads to results that are absurd or "demonstrably at odds with the intentions of its drafters," and the Supreme Court has ruled that such interpretations should be avoided if there are alternative interpretations that are consistent with the legislative intent. *Griffin*, 458 U.S. at 575. Thus, the non-presumptive starting point approach best reconciles the relevant Bankruptcy Code provisions and the intent of Congress based on two Supreme Court exceptions to the "plain meaning rule" and the power vested in the bankruptcy court as a court of equity under 11 U.S.C. § 105(a) to implement the provisions of the Bankruptcy Code.

Respectfully submitted,

NED W. WAXMAN
Counsel of Record
THE COLLEGE OF WILLIAM AND MARY
THE MASON SCHOOL OF BUSINESS
P.O. Box 8795
Williamsburg, VA 23187-8795
(757) 221-2859

January 28, 2010