

NOV 07 2007

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | |
|----|-------------------------------|---|-------------------------|
| 6 | In re: |) | BAP No. NC-07-1201-DCaK |
| 7 | JOHN PAK, |) | Bk. No. 05-49326 |
| 8 | Debtor. |) | |
| 9 | _____ |) | |
| 10 | JOHN PAK, |) | |
| 11 | Appellant, |) | |
| 12 | v. |) | OPINION |
| 13 | eCAST SETTLEMENT CORPORATION; |) | |
| 14 | AMERICAN EXPRESS CENTURION |) | |
| 15 | BANK; MARTHA BRONITSKY, |) | |
| 16 | Trustee; UNITED STATES |) | |
| | TRUSTEE, |) | |
| | Appellees. |) | |
| | _____ |) | |

Argued and Submitted on October 26, 2007
at Sacramento, California

Filed - November 7, 2007

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Leslie J. Tchaikovsky, Bankruptcy Judge, Presiding.

Before: DUNN, CARROLL,¹ and KLEIN, Bankruptcy Judges.

¹ Hon. Peter H. Carroll, Bankruptcy Judge for the Central District of California, sitting by designation.

1 DUNN, Bankruptcy Judge:

2 In this appeal, we address one of the most perplexing issues
3 that has arisen in chapter 13 under the Bankruptcy Abuse
4 Prevention and Consumer Protection Act of 2005 ("BAPCPA")--
5 interpretation of the term "projected disposable income" in
6 § 1325(b)(1)(B).² The debtor, John Pak ("Pak"), whose
7 "disposable income" under the statutory definition was less than
8 one third of his actual net income available to pay creditors,
9 appeals the bankruptcy court's order dismissing his chapter 13
10 case after denying confirmation of Pak's amended chapter 13 plan.
11 We AFFIRM.

12
13 **I. FACTS**

14 The factual background is not in dispute. Pak is a software
15 engineer. He was laid off from his employment in April 2002 and
16 did not find new employment until August 2005, approximately 39
17 months later. During the period that he was unemployed, Pak
18 lived on savings, unemployment benefits and distributions from
19 his 401K plan. He also accumulated substantial unsecured debt.

20 Since August 2005, Pak has found work in his field as a
21 software engineer, but as a "contract worker through a job shop,"
22 with no health insurance or other benefits. His gross
23 compensation is \$8,666.67 per month, for a total of \$104,004.04
24 per year.

25 On October 31, 2005, Pak filed a voluntary chapter 7
26 petition. His original schedules of income and expenses

27 _____
28 ² Unless otherwise indicated, all "Code," chapter and
section references are to the federal Bankruptcy Code, 11 U.S.C.
§§ 101-1532, as amended by BAPCPA, Pub. L. 109-8, 119 Stat. 23,
as the case from which this appeal arises was filed after October
17, 2005, the effective date of most BAPCPA provisions.

1 (Schedules I and J) showed net take home pay of \$5,530.20 per
2 month and expenses of \$3,718.00, leaving a net monthly income of
3 \$1,812.20. Pak listed general unsecured claims totaling
4 \$172,931.24 in his Schedule F.

5 Pak filed an Official Form 22A ("Form 22A"), on which
6 chapter 7 debtors calculate "current monthly income" under
7 § 101(10A) and monthly expenses recognized under § 707(b)(2).³
8 Since § 101(10A) requires that current monthly income be
9 calculated historically, based on average gross income received
10 during the six-month period ending with the month prior to the
11 month during which his bankruptcy petition was filed, the
12 "current monthly income" on Pak's Form 22A (\$2,666.67 monthly,
13 and \$32,000.04 annually) was less than one third of his actual
14 income at the time of his bankruptcy filing, because Pak was not
15 employed during four of the six months of the relevant period.
16 All parties agree that Pak's annualized "current monthly income"
17 was below the median income for a California household of one
18 person.

19 On April 14, 2006, the United States Trustee ("UST") filed a
20 motion to dismiss ("Motion to Dismiss") Pak's chapter 7 case as
21 an abuse under § 707(b)(3). On May 18, 2006, the bankruptcy
22 court granted the Motion to Dismiss in a published decision, In
23 re Pak, 343 B.R. 239 (Bankr. N.D. Cal. 2006). Pak filed a Motion
24 to Convert Case to Chapter 13 on May 26, 2006, which the
25 bankruptcy court granted on May 31, 2006.

27 ³ Form 22 was known as Form B22 in the interim preceding
28 the effective date of the official Forms. Some jurisdictions
continue to refer to the official Form as Form B22.

1 Pak filed amended Schedules I and J ("Amended Schedules I
2 and J") and a chapter 13 plan on June 26, 2006. Pak's Amended
3 Schedules I and J reflected net take home pay of \$5,411.89 per
4 month and expenses of \$4,421.99, with a balance of \$989.70 net
5 monthly income. Pak's proposed chapter 13 plan provided for
6 payments of \$300.00 a month for 36 months. On August 1, 2006,
7 Pak filed an amended chapter 13 plan ("Amended Plan"), proposing
8 payments of \$300.00 a month for 35 months, with a final payment
9 of \$322.20 in month 36. Pak's proposed payments under the
10 Amended Plan would total \$10,822.20. If Pak made chapter 13 plan
11 payments based on his net monthly income, as reflected on his
12 Amended Schedules I and J, his payments would total \$35,629.20
13 over the life of a 36 month plan.

14 American Express Centurion Bank and eCast Settlement
15 Corporation (collectively, the "Objecting Creditors"), the
16 Trustee, and the UST each objected to confirmation of the Amended
17 Plan, arguing that the Amended Plan failed to commit all of Pak's
18 "projected disposable income" to payment of unsecured claims.
19 Pak countered that the Amended Plan met "the requirements of
20 § 1325 in that more than his statutory disposable income for 36
21 months [was] committed to the plan."

22 After giving the parties opportunities to brief the issues
23 and hearing oral argument, the bankruptcy court issued its
24 memorandum of decision on December 14, 2006, published at 357
25 B.R. 549 (Bankr. N.D. Cal. 2006), sustaining objections to and
26 denying confirmation of the Amended Plan. The bankruptcy court
27 entered an order denying confirmation of the Amended Plan on
28 December 27, 2006.

1 Pak filed a Motion for Leave to Appeal the bankruptcy
2 court's order denying confirmation of the Amended Plan with the
3 Panel on January 4, 2007, which motion was denied based on the
4 interlocutory nature of the order.

5 Pak subsequently waived the right to amend further his
6 chapter 13 plan, at which point the bankruptcy court granted the
7 Trustee's motion to dismiss Pak's bankruptcy case. The dismissal
8 order was entered on May 10, 2007. Pak filed his Notice of
9 Appeal on May 17, 2007.

10 On Pak's motion, the bankruptcy court entered an Order
11 Staying Dismissal Pending Appeal on August 6, 2007.

12 13 **II. JURISDICTION**

14 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
15 §§ 1334 and 157(b)(1) and (b)(2)(L). We have jurisdiction
16 pursuant to 28 U.S.C. § 158.

17 18 **III. ISSUE**

19 Whether the bankruptcy court erred in concluding that Pak's
20 Amended Plan was not confirmable, as not committing all of Pak's
21 "projected disposable income" to pay unsecured creditors, as
22 required pursuant to § 1325(b)(1)(B).

23 24 **IV. STANDARD OF REVIEW**

25 We review issues of statutory construction and conclusions
26 of law, including interpretation of provisions of the Bankruptcy
27 Code, de novo. Einstein/Noah Bagel Corp. v. Smith (In re BCE W.,
28 L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003); Mendez v. Salven (In

1 re Mendez), 367 B.R. 109, 113 (9th Cir. BAP 2007).

2
3 **V. DISCUSSION**

4 This appeal raises thorny issues of statutory construction.
5 Since the Trustee and the Objecting Creditors objected to
6 confirmation of Pak's Amended Plan, the immediate statutory
7 battleground is § 1325(b)(1)(B), which provides:

8 If the trustee or the holder of an allowed unsecured
9 claim objects to the confirmation of the plan, then the
10 court may not approve the plan unless, as of the
effective date of the plan-

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

(Emphasis added.)

15 Pak argues in effect that the bankruptcy court erred in not
16 applying the term "disposable income" as defined in § 1325(b)(2)⁴

18 ⁴ Section 1325(b)(2) provides:

19 For purposes of this subsection, the term "disposable
20 income" means current monthly income received by the
21 debtor (other than child support payments, foster care
22 payments, or disability payments for a dependent child
23 made in accordance with applicable nonbankruptcy law to
24 the extent reasonably necessary to be expended for such
25 child) less amounts reasonably necessary to be
26 expended-

25 (A) (i) for the maintenance or support of the debtor or
26 a dependent of the debtor, or for a domestic support
27 obligation, that first becomes payable after the date
28 the petition is filed; and

(ii) for charitable contributions (that meet the
definition of "charitable contribution" under section
548(d)(3) to a qualified religious or charitable entity
or organization (as defined in section 548(d)(4)) in an
amount not to exceed 15 percent of gross income of the
debtor for the year in which the contributions are made;
and

(continued...)

1 consistent with its "plain meaning." In Pak's view, the addition
2 of the term "projected" to "disposable income" in § 1325(b)(1)(B)
3 adds a mere multiplier, based on the number of months within the
4 applicable commitment period (in this case, 36 months), to
5 determine the minimum amount that a debtor must pay to his
6 unsecured creditors in chapter 13 in order to satisfy the
7 § 1325(b)(1)(B) condition to confirmation.

8 Statutory interpretation begins with a review of the
9

10 ⁴(...continued)

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

14 The term "current monthly income" itself is defined in § 101(10A)
15 as:

16 (A) . . . the average monthly income from all sources
17 that the debtor receives (or in a joint case the debtor
18 and the debtor's spouse receive) without regard to
19 whether such income is taxable income, derived during
20 the 6-month period ending on-

21 (i) the last day of the calendar month immediately
22 preceding the date of the commencement of the case if
23 the debtor files the schedule of current income
24 required by section 521(a)(1)(B)(ii); or

25 (ii) the date on which current income is determined by
26 the court for purposes of this title if the debtor does
27 not file the schedule of current income required by
28 section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than
the debtor (or in a joint case the debtor and the
debtor's spouse), on a regular basis for the household
expenses of the debtor or the debtor's dependents (and
in a joint case the debtor's spouse if not otherwise a
dependent), but excludes benefits received under the
Social Security Act, payments to victims of war crimes
or crimes against humanity on account of their status
as victims of such crimes, and payments to victims of
international terrorism (as defined in section 2331 of
title 18) or domestic terrorism (as defined in section
2331 of title 18) on account of their status as victims
of such terrorism.

1 language used by Congress in the current version of the law.

2 The starting point in discerning congressional intent
3 is the existing statutory text, see Hughes Aircraft Co.
4 v. Jacobson, 525 U.S. 432, 438 (1999), and not the
5 predecessor statutes. It is well established that
6 "when the statute's language is plain, the sole
7 function of the courts--at least where the disposition
8 required by the text is not absurd--is to enforce it
9 according to its terms."

7 Lamie v. United States Trustee, 540 U.S. 526, 534 (2004)

8 (citations omitted). When the statutory language is ambiguous,
9 however, courts may look beyond the statute itself to its
10 legislative history and common usage of subject terms for
11 guidance as to interpretation, as well as the context in which
12 they are used. "Whether a statute is ambiguous is determined by
13 reference to the language itself, the specific context in which
14 that language is used, and the broader context of the statute as
15 a whole." Hough v. Fry (In re Hough), 239 B.R. 412, 414 (9th
16 Cir. BAP 1999) (quoting Robinson v. Shell Oil Co., 519 U.S. 337,
17 341 (1997)). See In re Slusher, 359 B.R. 290, 295 (Bankr. D.
18 Nev. 2007) ("In determining the sense of the words Congress chose,
19 it is appropriate to investigate the contexts in which English
20 generally and the Bankruptcy Code specifically employ the same or
21 similar words.").

22 The term "projected disposable income" is not new with the
23 BAPCPA amendments to the Bankruptcy Code. Before BAPCPA,
24 "projected disposable income" was derived from "income not
25 reasonably necessary for maintaining or supporting the debtor or
26 a dependent, with that determination being made on an estimated
27 basis at plan confirmation." Id. at 294. In most cases,
28 disposable income was determined by subtracting the debtor's

1 monthly expenses, as set forth on Schedule J, from the monthly
2 net income stated on the debtor's Schedule I.

3 Congress changed the determination of "disposable income" in
4 chapter 13 under BAPCPA by adding extended, if not necessarily
5 precise, definitional terms in §§ 1325(b)(2) and (b)(3)⁵ and
6 101(10A). However, Congress did not alter either the term
7 "projected disposable income" in § 1325(b)(1)(B) or the
8 requirement of § 1322(a)(1) that the debtor commit "such portion
9 of future earnings or other future income of the debtor to the
10 supervision and control of the trustee as is necessary for the
11 execution of the plan." (Emphasis added.)

12 A number of courts have followed Pak's reasoning and have
13 concluded that the term "projected" must be mechanically linked
14 to the changed definition of "disposable income," both as a
15 matter of "plain meaning" statutory interpretation and common

16
17 ⁵ Section 1325(b)(3) provides:

18 Amounts reasonably necessary to be expended under
19 paragraph (2) shall be determined in accordance with
20 subparagraphs (A) and (B) of section 707(b)(2), if the
21 debtor has current monthly income, when multiplied by
22 12, greater than-

23 (A) in the case of a debtor in a household of 1
24 person, the median family income of the applicable
25 State for 1 earner;

26 (B) in the case of a debtor in a household of 2,
27 3, or 4 individuals, the highest median family
28 income of the applicable State for a family of the
same number or fewer individuals; or

(C) in the case of a debtor in a household
exceeding 4 individuals, the highest median family
income of the applicable State for a family of 4 or
fewer individuals, plus \$525 per month for each
individual in excess of 4.

1 sense. The definition of "disposable income" in § 1325(b)(2) is
2 expressly limited to § 1325(b) ("For purposes of this subsection,
3 the term 'disposable income' means . . . "), but the words
4 "disposable income" appear only at one other place in § 1325(b),
5 as part of the phrase "projected disposable income." This has
6 led some courts to conclude that "[i]f 'disposable income' is not
7 linked to 'projected disposable income' then it is just a
8 floating definition with no apparent purpose." In re Alexander,
9 344 B.R. 742, 748 (Bankr. E.D.N.C. 2006). See, e.g., Coop v.
10 Frederickson (In re Frederickson), No. 07-6025EA, 2007 WL 2752769
11 (8th Cir. BAP Sept. 24, 2007); In re Kolb, 366 B.R. 802 (Bankr.
12 S.D. Ohio 2007); In re Hanks, 362 B.R. 494 (Bankr. D. Utah 2007);
13 In re Kagenveama, No. 05-28079-PHX-CGC, 2006 Bankr. LEXIS 2759
14 (Bankr. D. Ariz. July 10, 2006); In re Tranmer, 355 B.R. 234
15 (Bankr. D. Mont. 2006); In re Rotunda, 349 B.R. 324 (Bankr.
16 N.D.N.Y. 2006); In re Guzman, 345 B.R. 640 (Bankr. E.D. Wis.
17 2006); In re Barr, 341 B.R. 181 (Bankr. M.D.N.C. 2006).

18 The bankruptcy court's Kagenveama decision provides a
19 typical example of the "plain meaning" analysis applied to
20 "projected disposable income" in § 1325(b)(1)(B):

21 Care was taken by Congress to modify the old definition
22 of disposable income and to replace it with one based
23 upon "current monthly income." This is clear; there
24 can be no doubt about it. Section 1325(b)(2) states
25 what the definition of "disposable income" is "for the
26 purpose of this subsection"; nowhere else, other than
27 in Section 1325(b)(1)(B), do the words "disposable
28 income" appear in the referenced subsection. Unless
the definition applies to "projected disposable
income," it has no meaning.

27 In re Kagenveama, 2006 Bankr. LEXIS 2759 at *5. However, the
28 Kagenveama court explicitly recognized the incongruous results

1 from its interpretation of "projected disposable income."

2 There are, of course, practical difficulties with the
3 conclusion that "projected disposable income" is
4 necessarily defined by "current monthly income." The
5 most obvious is that historical current monthly income
6 may or may not have any relationship to the actual
7 income to be received by the debtors during the course
8 of their Chapter 13 plan. For that purpose, the
9 previous "I and J" approach would seem to yield a more
10 reality-based number. However, Congress has chosen not
11 to rely on I and J, notwithstanding their proven
12 utility, and that is Congress' choice to make. But
13 this case illustrates the problems caused by this
14 approach. Debtor's Schedules I and J yield "disposable
15 income" of \$1,523.89; however, "disposable income" as
16 shown on Debtor's B22C form is a -\$4.04. Given the
17 stated purposes of BAPCPA, it is both ironic and
18 unfortunate that this Debtor with resources available
19 to pay unsecured creditors will not be required to do
20 so in this case.

21 Id. at *5-7.

22 In our view, consistent with the holdings of most courts
23 that have considered the issue,⁶ Congress' retention of the term
24 "projected" to modify "disposable income" in § 1325(b)(1)(B) is

25 ⁶ See, e.g., In re McCarty, No. 06-51875, 2007 WL 2937126
26 (Bankr. N.D. Ohio Sept. 28, 2007); In re Warren, No. 07-30721-
27 DHW, 2007 WL 2683837 (Bankr. M.D. Ala. Sept. 6, 2007); In re
28 Mancl, 375 B.R. 514, 516 (Bankr. W.D. Wis. 2007) ("As this case
illustrates, the integration of the means test into the
calculation of projected disposable income can hardly be
characterized as seamless."); In re Meek, 370 B.R. 294 (Bankr. D.
Idaho 2007); In re Knippers, No. 06-34841-H3-13, 2007 WL 1239297
(Bankr. S.D. Tex. Apr. 26, 2007); In re Mullen, 369 B.R. 25
(Bankr. D. Or. 2007); In re LaPlana, 363 B.R. 259 (Bankr. M.D.
Fla. 2007); Kibbe v. Sumski (In re Kibbe), 361 B.R. 302 (1st Cir.
BAP 2007); In re Gordon, 360 B.R. 679 (Bankr. S.D. Cal. 2007); In
re Riggs, 359 B.R. 649 (Bankr. E.D. Ky. 2007); In re Slusher, 359
B.R. 290 (Bankr. D. Nev. 2007); In re Bossie, No. A06-00432-DMD,
2006 Bankr. LEXIS 3956, at *4-5 (Bankr. D. Alaska Dec. 12, 2006);
In re Casey, 356 B.R. 519 (Bankr. E.D. Wash. 2006); In re LaSota,
351 B.R. 56 (Bankr. W.D.N.Y. 2006); In re Demonica, 345 B.R. 895
(Bankr. N.D. Ill. 2006); In re Gress, 344 B.R. 919 (Bankr. W.D.
Mo. 2006); In re Risher, 344 B.R. 833 (Bankr. W.D. Ky. 2006); In
re Dew, 344 B.R. 655 (Bankr. N.D. Ala. 2006); In re McGuire, 342
B.R. 608 (Bankr. W.D. Mo. 2006); In re Clemons, No. 05-85163,
2006 Bankr. LEXIS 1366, at *16-17 (Bankr. N.D. Ga. June 1, 2006);
In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006).

1 ambiguous. It does not fit as neatly into the role of mindless
2 multiplier as the "plain meaning" decisions would suggest, for
3 the following reasons.

4 First, neither "projected" nor "projected disposable income"
5 is defined in the Bankruptcy Code.⁷ Yet, the addition of the
6

7 ⁷ The term "projected disposable income" appears in five
8 sections of the Bankruptcy Code other than § 1325(b)(1)(B), none
9 of which purports to define it. See §§ 1129(a)(15)(B),
10 1222(a)(4), 1225(b)(1)(B), 1225(b)(1)(C) and 1322(a)(4). Several
11 courts and at least one commentator have cited § 1129(a)(15)(B),
12 added by BAPCPA, as evidence for the proposition that "projected
13 disposable income" is nothing more than "disposable income"
14 annualized. See, e.g., Frederickson, 2007 WL 2752769; In re
15 Berger, No. 07-10112-JDW, 2007 WL 1704403 (Bankr. M.D. Ga. June
16 11, 2007); and Hon. Randolph J. Haines, Chapter 11 May Resolve
17 Some Chapter 13 Issues, 8 Norton Bankr. L. Advisor 1 (Aug. 2007).

18 Section 1129(a)(15)(B) provides:

19 In a case in which the debtor is an individual and in
20 which the holder of an allowed unsecured claim objects
21 to the confirmation of the plan-

22 . . .
23 (B) the value of the property to be distributed under
24 the plan is not less than the projected disposable
25 income of the debtor (as defined in section 1325(b)(2))
26 to be received during the 5-year period beginning on
27 the date that the first payment is due under the plan,
28 or during the period for which the plan provides
payments, whichever is longer.

(Emphasis added.)

Of course, contrary to § 1129(a)(15)(B)'s parenthetical
"plain meaning" statement, "projected disposable income" is not
defined in § 1325(b)(2). It is possible that in drafting
§ 1129(a)(15)(B), Congress intended to equate "projected
disposable income" with a simple multiple of "disposable income,"
as defined in § 1325(b)(2). Or, it is possible that Congress'
use of the term "projected disposable income" in § 1129(a)(15)(B)
is simply one more example of the "loose language" with which
(continued...)

1 term "projected" to "disposable income" in § 1325(b)(1)(B)
2 differentiates it from "disposable income," as defined in
3 § 1325(b)(2). To interpret it otherwise tends to rob it of
4 meaning. See, e.g., BFP v. Resolution Trust Corp., 511 U.S. 531,
5 537 (1994) ("Congress acts intentionally and purposefully when it
6 includes particular language in one section of a statute but
7 omits it in another."); In re Jass, 340 B.R. 411, 415 (Bankr. D.
8 Utah 2006) ("the Court must give meaning and import to every word
9 in a statute").

10 The term "projected" is essentially forward-looking. It
11 means "to calculate, estimate or predict (something in the
12 future) based on present data or trends." Id. (quoting The
13 American Heritage College Dictionary 1115 (4th ed. 2002)). It
14 was so interpreted pre-BAPCPA. See Anderson v. Satterlee (In re
15 Anderson), 21 F.3d 355, 357 n.5 (9th Cir. 1994).⁸ Treating
16 "projected" as future-oriented also is consistent with the
17 § 1325(b)(1) requirement that its "projected disposable income"
18 condition be applied "as of the effective date of the plan."

19 Like "projected disposable income," the term "effective date
20 of the plan" is not defined in the Bankruptcy Code, and it has
21 been interpreted differently in the various statutory contexts in
22

23 ⁷(...continued)

24 "BAPCPA is filled," as Pak recognizes. See Appellant's Reply
25 Brief, at page 3, lines 18-19.

26 We agree with the bankruptcy court in In re Slusher, 359
27 B.R. at 297, that none of the provisions of the Bankruptcy Code
28 incorporating the term "projected disposable income" provides
definitive guidance as to its interpretation.

⁸ In Anderson, the Ninth Circuit noted that the definition
of "project" was "to plan, figure or estimate for the future,"
quoting Webster's Ninth New Collegiate Dictionary 940 (1984).

1 which it is used. See, e.g., In re Fleishman, 372 B.R. 64, 70-74
2 (Bankr. D. Or. 2007) (compare interpretation under § 1325(a)(4)
3 with interpretation of the term under § 1225(a)(4)).

4 In § 1325(b)(1), the most logical interpretation of the
5 "effective date of the plan" is the date of plan confirmation, as
6 a chapter 13 plan is not binding on the debtor and other
7 interested parties until it is confirmed. See § 1327(a).⁹ If
8 the determination of the debtor's "projected disposable income to
9 be received in the applicable commitment period" is to be made at
10 the time of chapter 13 plan confirmation, which often occurs
11 months after the petition date, it makes little sense to tie that
12 determination exclusively to income information for the period of
13 six months prior to the debtor's bankruptcy filing. In contrast,
14 "disposable income" is calculated historically, based either on
15 the debtor's income during the six full months preceding the
16 debtor's bankruptcy filing, if, as in this case and in most
17 cases, the debtor filed the required schedule of current income
18 on Form B22A or Form B22C, or during the six months preceding the
19 bankruptcy court's determination of the debtor's current income,
20 if the debtor did not file such a schedule. See § 101(10A)(A)(i)
21 and (ii).

22 The BAPCPA legislative history is generally not helpful in
23 shedding light on why Congress should take such pains to add
24 extended definitions for the terms "current monthly income" and

25
26 ⁹ Section 1327(a) provides:

27 The provisions of a confirmed plan bind the debtor and
28 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.

1 "disposable income" in the Bankruptcy Code, while leaving the
2 term "projected disposable income" unchanged. However, the
3 BAPCPA legislative history does make clear that Congress intended
4 to require debtors to "make a good-faith effort to repay as much
5 as they can afford."¹⁰

6 Second, the "plain meaning" interpretation of "projected
7 disposable income" takes leave of reality when faced with debtors
8 whose incomes change dramatically, due to a change in employment
9 status or otherwise during the six months preceding their
10 bankruptcies. This is not a one-way ratchet problem: for every
11 debtor whose increased income from the "disposable income"
12 calculation would mean money left on the table that otherwise
13 could be paid to creditors, there are debtors whose decreased
14 income would effectively preclude their proposing a feasible
15 chapter 13 plan. See Mancl, 375 B.R. at 517 ("Blind adherence to
16 the Form B22C for the determination of a debtor's income could
17 lead to arbitrary results based solely on the timing of the
18 petition, potentially penalizing both debtors and creditors
19 unfairly.").

20 For example, in Warren, 2007 WL 2683837, at *1, during the
21 six months prior to the debtor's chapter 13 filing, she received
22 income from three sources: (1) \$5,514 a month from her employment
23 by the state of Alabama; (2) \$800 a month distributions from her
24 deceased father's estate; and (3) \$350 a month for her services

26 ¹⁰ BAPCPA Presidential Signing Statement,
27 <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html>.
28 See 151 Cong. Rec. S2462-02 (Mar. 10, 2005) (statement of Sen.
Sessions) ("People who need a fresh start under this bill will get
one. The people who can pay some of their debts back will have
to do that.").

1 as treasurer of the State Employees Grill. However, her services
2 as State Employees Grill treasurer ended the month she filed her
3 chapter 13 case, and the distributions from her father's estate
4 were scheduled to end three months after her bankruptcy filing.

5 The chapter 13 trustee argued that the debtor's disposable
6 income calculated in her schedule of current income on Form 22C
7 "fixes the debtor's obligation during the life of the plan
8 regardless of a change in circumstances." Id. at *2. The
9 bankruptcy court held that the Form 22C calculation created "a
10 presumptive starting point for determining 'projected disposable
11 income' that may be rebutted by evidence of the debtor's loss of
12 a source of income included in that calculation." Id. at *2.
13 The bankruptcy court reached that determination based on its
14 conclusion that interpreting "projected disposable income" as
15 irrevocably tied to "disposable income," as defined in
16 § 1325(b) (2), "would produce results at odds with both
17 Congressional intent and common sense," in that it would force a
18 debtor who otherwise was qualified for chapter 13 relief into a
19 plan that clearly was not feasible. Id.

20 Similarly, in Jass, 340 B.R. 411, the bankruptcy court faced
21 a situation where the chapter 13 debtors' Form B22C reflected
22 "disposable income" of \$3,625.63 per month, but the debtors
23 proposed to pay their unsecured creditors only \$790.00 a month in
24 their chapter 13 plan. The trustee objected to confirmation of
25 the debtors' plan, arguing that because the debtors were not
26 proposing to pay \$3,625.63 each month to their unsecured
27 creditors, their plan did not satisfy the "disposable income"
28 test of § 1325(b) (1) (B). The debtors argued that medical

1 problems experienced by Mr. Jass resulted in a decrease in future
2 income from what was set forth in their Form B22C, and they
3 should not be bound by the form's "inadequate representations of
4 their future budget." Id. at 414.

5 The bankruptcy court differentiated the terms "disposable
6 income," as used in § 1325(b)(2), and "projected disposable
7 income," as used in § 1325(b)(1)(B), holding that the word
8 "projected" had independent significance, as being "future-
9 oriented." Id. at 415. It determined that the Form B22C
10 calculation was the starting point for the bankruptcy court's
11 consideration of "projected disposable income," but further
12 concluded that the Form B22C number could be rebutted if it "does
13 not adequately represent the debtor's budget projected into the
14 future." Id. at 415-16. It underlined its determination as
15 consistent with the fundamental policies of the Bankruptcy Code,
16 reasoning that,

17 If § 1325(b)(1)(B) required a debtor to always pay the
18 calculated disposable income amount resulting from Form
19 B22C, the Court would essentially foreclose the
potential for bankruptcy relief from a group of chapter
13 debtors who are otherwise eligible for relief.

20 Id. at 417.

21 The bankruptcy court ultimately concluded,
22 Form B22C will always be the starting point for the
23 Court's inquiry into whether the debtor is complying
24 with the "projected disposable income" requirement of
25 § 1325(b)(1)(B). The Court will presume that the
26 number resulting from Form B22C is the debtor's
27 "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.

28 Id. at 418.

1 This case presents the opposite face of the same problem:
2 The calculation of current income on Pak's Form 22A is materially
3 reduced by Pak's unemployment during four of the six months
4 averaged into the calculation. Because the term "disposable
5 income" is included within the term "projected disposable
6 income," we agree with the bankruptcy courts in both Jass and
7 Alexander, 344 B.R. at 748, that the calculated "disposable
8 income" of the debtor must be the starting point in determining
9 "projected disposable income." The standards for determining
10 "disposable income" initially anchor the term "projected
11 disposable income." However, if the interpretation of "projected
12 disposable income" is not to degenerate into absurdity, deriving
13 "projected disposable income" from "disposable income" must be
14 subject to the presentation of contrary evidence before
15 confirmation of a debtor's chapter 13 plan. "Chapter 13 is not
16 some alternative universe where reality dare not intrude."
17 Mullen, 369 B.R. at 34. It makes no sense to interpret
18 "projected disposable income," governing debtors' future payments
19 under their chapter 13 plans, as cast in stone by their pre-
20 bankruptcy history, without any opportunity for the trustee,
21 creditors or the debtor to offer rebutting evidence as to changed
22 income circumstances before the effective date of the plan.

23 In addition, treating "projected disposable income" as no
24 more than a multiple of "disposable income" distorts application
25 of the plan modification provisions of §§ 1323 and 1329.¹¹ Under
26

27 ¹¹ Section 1323(a) provides,
28

(a) The debtor may modify the plan at any time before
confirmation, but may not modify the plan so that the
plan as modified fails to meet the requirements of

(continued...)

1 § 1323(a) pre-BAPCPA, nothing prevented a debtor from proposing a
2 plan modification that would increase or decrease plan payments
3 based upon changes in the debtor's circumstances prior to plan
4 confirmation. Section 1323(a) was not amended by BAPCPA.
5 However, if "projected disposable income" is treated as an
6 unalterable multiple of "disposable income," as defined in
7 § 1325(b)(2), such plan modifications would be prohibited. This,
8 in effect, is the problem that the Warren and Jass courts were
9 dealing with.

10 Postconfirmation plan modifications pursuant to § 1329
11 present a more complex problem. If "projected disposable
12 income," determined as of the effective date of the plan under
13 § 1325(b)(1)(B), is no more than "disposable income" determined
14 from the Form B22A or B22C multiplied by the number of months in
15 the applicable commitment period, is that "projected disposable
16 income" fixed and impervious to modification for the life of the
17 plan? The Fourth Circuit has held that "the doctrine of res
18 judicata prevents modification of a confirmed plan pursuant to
19 §§ 1329(a)(1) or (a)(2) unless the party seeking modification
20 demonstrates that the debtor experienced a 'substantial' and
21 'unanticipated' post-confirmation change in his financial
22 condition." Murphy v. O'Donnell (In re Murphy), 474 F.3d 143,

23
24 ¹¹(...continued)
25 section 1322 of this title.

26 Section 1329(a)(1) provides,

27 (a) At any time after confirmation of the plan but
28 before the completion of payments under such plan, the
plan may be modified, upon request of the debtor, the
trustee, or the holder of an allowed unsecured claim,
to-

(1) increase or reduce the amount of payments on claims
of a particular class provided for by the plan. . . .

1 149 (4th Cir. 2007) (citing Arnold v. Weast (In re Arnold), 869
2 F.2d 240, 243 (4th Cir. 1989)).

3 This Panel, following the Seventh Circuit, rejected that
4 position in Powers v. Savage (In re Powers), 202 B.R. 618, 622
5 (9th Cir. BAP 2002), but concluded that "the circumstances of the
6 debtor's changed financial situation can then be considered in
7 exercise of the court's discretion." Id. See Barbosa v.
8 Soloman, 235 F.3d 31, 41 (1st Cir. 2000); Matter of Witkowski, 16
9 F.3d 739, 744-46 (7th Cir. 1994); Ledford v. Brown (In re Brown),
10 219 B.R. 191, 193-95 (6th Cir. BAP 1998). Although the Ninth
11 Circuit has not ruled on the preclusive effects of confirmed
12 chapter 13 plans, dicta in Anderson suggest that at least in
13 1994, the Ninth Circuit was inclined to the Fourth Circuit view.
14 See Anderson, 21 F.3d at 358.

15 Ironically (and irrationally), if the Fourth Circuit
16 position ultimately were to prevail, and the "plain meaning"
17 courts' interpretation of "projected disposable income" were
18 upheld, the debtor, trustee and unsecured creditors would be
19 precluded from proposing chapter 13 plan modifications pursuant
20 to § 1329(a) in the absence of the debtor's experiencing
21 substantial income changes postconfirmation, while the bankruptcy
22 court would be precluded from considering such changed financial
23 circumstances preconfirmation. We conclude that interpreting the
24 "projected disposable income" provision of § 1325(b)(1)(B) in
25 that way makes no sense.

26 27 **VI. CONCLUSION**

28 For all of the reasons discussed above, we conclude that in

1 interpreting "projected disposable income" in § 1325(b)(1)(B),
2 "disposable income," as defined in § 1325(b)(2), is the starting
3 point for determining "projected disposable income," subject to
4 adjustment, based on evidence, to reflect reality going forward.
5 In this case, Pak's disposable income was skewed by four months
6 of unemployment, averaged into the six months' prepetition
7 determination of his current income on his Form 22A. The
8 bankruptcy court appropriately considered the very substantial
9 change in Pak's employment and financial situation following the
10 extended period of his unemployment in determining whether to
11 confirm the Amended Plan and declining to confirm it. We AFFIRM.

12
13 KLEIN, Bankruptcy Judge, concurring:

14
15 I agree that we should affirm the dismissal of the chapter
16 13 case that was based on the refusal of a debtor who could fund
17 a \$35,000 plan to propose a plan that pays more than \$10,822.20.
18 Conceding that the statute makes it impossible to articulate an
19 indisputably correct answer, I would prefer to affirm on a
20 different theory.

21
22 I

23 The chapter 13 "disposable income" objection-to-confirmation
24 problem is a classic paradox. The emphasis in §§ 101(10A) and
25 1325(b) on historical income as the threshold for confirming a
26 chapter 13 plan over an objection contradicts the basic premise
27 embodied in §§ 1306(a) and 1322(a)(1) that chapter 13 plans are
28 funded by future income that really exists and runs counter to

1 the only thing that appears to be unambiguous about the 2005
2 consumer amendments to the Bankruptcy Code: the policy that more
3 debtors should be diverted from chapter 7 liquidations to chapter
4 13 repayment plans.

5
6 A

7 Neither the majority's solution of cutting the Gordian Knot
8 by allowing present fact to trump § 1325(b)(2) "disposable
9 income," nor the competing solution of rigidly adhering to a
10 statutory construction of "disposable income" that ignores
11 present fact in a manner that would bar from chapter 13 some
12 debtors capable of paying at least as much as in chapter 7 while
13 (as here) permitting others to pay less than what they could
14 actually pay, is entirely satisfactory. The former, however, has
15 the advantage of being more consistent with the policy of
16 promoting payment through expanded use of chapter 13.

17 I submit there must be a better solution than cutting the
18 Gordian Knot to achieve a practical common-sense result, instead
19 of applying a rigidly-tunneled vision of § 1325(b) supported by
20 invocations of "plain meaning" that serve as rhetorical devices
21 to bolster unsatisfactory argument for an unpalatable result. In
22 a sense, however, it is a false dilemma because the "either-or"
23 choice does not account for other analyses. If I must choose
24 between the two, then the Gordian Knot solution that has been
25 applied by a substantial number of courts throughout the country
26 fits better with the 2005 policy of increasing payments to
27 creditors than a rigid analysis that offends the policy.

1 B

2 Any solution that will be serviceable in the long term must
3 meet several criteria. First, it must, as in the facts of the
4 present appeal, account for the debtor whose real income
5 available during the life of the chapter 13 plan is greater than
6 § 1325(b) "disposable income." Second, it must also account for
7 the debtor whose real income is less than § 1325(b) "disposable
8 income" but who can pay enough to fund an otherwise confirmable
9 plan. While this second requirement may seem counterintuitive to
10 those who think that no trustee or unsecured creditor would raise
11 a § 1325(b) objection (§ 1325(b) applies only if objection is
12 made) to a plan that is going to pay more than in chapter 7, the
13 reality is that some unsecured creditors are animated by spite or
14 a sense that they will have greater leverage if they can force a
15 debtor out of bankruptcy.

16 Finally, our legal tradition requires that a solution must
17 be based on a plausible construction of the language of the
18 statute.

19
20 II

21 If there is anything "plain" about the "disposable income"
22 portion of the statute, it is that, in context, it is not
23 "plain."

24 Justice Thomas, writing for a unanimous Supreme Court, has
25 given us the applicable rule of statutory construction for when
26 one may look beyond the mere words of the statute: "The
27 plainness or ambiguity of statutory language is determined by
28 reference to the language itself, the specific context in which

1 the language is used, and the broader context of the statute as a
2 whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (9-0
3 decision).

4 Robinson is consistent with the observation of Justice
5 Scalia, also writing for a unanimous Supreme Court, that the
6 interpretation of the Bankruptcy Code "is a holistic endeavor"
7 and that "[a] provision that may seem ambiguous in isolation is
8 often clarified by the remainder of the statutory scheme -
9 because the same terminology is used elsewhere in a context that
10 makes its meaning clear or because only one of the permissible
11 meanings produces a substantive effect that is compatible with
12 the rest of the law." United Sav. Ass'n of Texas v. Timbers of
13 Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (9-0
14 decision).

15 This implicates what is known as the doctrine of "whole
16 statute" interpretation that we recently have described in
17 connection with a different Bankruptcy Code conundrum. Wechsler
18 v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.), 370
19 B.R. 236, 252 (9th Cir. BAP 2007); 2A NORMAN J. SINGER, SUTHERLAND
20 STATUTORY CONSTR. § 46:5 (5th ed. 1992).

21 When one considers the "whole statute," paths toward a
22 resolution more satisfactory to me emerge.

24 III

25 One solution is based on a close reading of the provisions
26 that implicate the term "current monthly income."

27 The context of § 1325(b) "disposable income" cannot be
28 viewed in isolation from the definition of "current monthly

1 income" at § 101(10A), and the adjustments to "current monthly
2 income" and expenses provided by § 707(b). All three of these
3 sections were added to the Bankruptcy Code as an integrated whole
4 in 2005. Moreover, context requires consideration of the
5 debtor's duty under § 521(a)(1)(B)(ii) to file "a schedule of
6 current income and current expenditures," the basic requirements
7 for chapter 13 plan confirmation under § 1325(a), and the
8 provisions under § 1329 for modifying a plan after confirmation
9 in order to account for changes in income.

10
11 A

12 "Current monthly income" is a Code-wide defined term that
13 focuses on the average of the debtor's income for six calendar
14 months before bankruptcy. The definition specifically cross-
15 references the debtor's § 521(a)(1)(B)(ii) duty to file a
16 "schedule of current income and current expenses," which
17 schedules have been required by § 521 since 1984 and are the
18 "Schedules I and J" that figure in the § 1325(b) debate. The
19 existence of this cross-reference is indicative of an intended
20 interconnection between historical income and current income.

21 "Current monthly income" has its most prominent role at
22 § 707(b) in connection with the statutory formula for determining
23 whether a consumer debtor's case under chapter 7 is an "abuse"
24 warranting dismissal or conversion to chapter 11 or 13. An
25 elaborate mechanism is prescribed for computing the monthly
26 expenses to be deducted from current monthly income.

27 Of particular interest in the present context is the
28 mechanism in § 707(b) for rebutting the statutory presumption by

1 demonstrating "adjustments of current monthly income for which
2 there is no reasonable alterative." 11 U.S.C. § 707(b)(2)(B)
3 (emphasis supplied). Such "adjustments of current monthly
4 income" must be based on "special circumstances" and be
5 "necessary and reasonable." The critical point for present
6 purposes, however, is that there is a mechanism for adjusting
7 "current monthly income" to reflect current circumstances so as
8 to avoid unjust results.

9 It is perhaps natural that heretofore the "special
10 circumstances" discussion has been focused on the expense side of
11 the equation because that is where most of the action occurs.
12 But the phrase "adjustments of current monthly income" must mean
13 something because we do our best to try to give effect to all
14 language in a statute. I submit that what is contemplated is a
15 significant and not transitory change in income. The evidence
16 supporting my view is in the language of § 707(b)(2)(B)(i):
17 "special circumstances, such as . . . a call or order to active
18 duty in the Armed Forces." One need only look at the official
19 United States military pay tables to recognize that a call to
20 active duty precipitates a substantial reduction in income for a
21 typical military reservist consumer.

22 Although the calculations of current monthly income and
23 monthly expenses required by § 101(10A) and § 707(b) appear in
24 tableau format on Form B22A for chapter 7 cases and Form B22C for
25 chapter 13 cases, the forms do not capture "special
26 circumstances" adjustments to income. Since all the requirements
27 of various versions of Form 22 (known as B22 in the interim
28 preceding the effective date of the official Forms) are imposed

1 directly or indirectly by the statute, the statute controls
2 whenever Form 22 diverges from the statute. Indeed, the Forms 22
3 resulted from the mandate in § 707(b)(2)(C) that a statement of
4 "current monthly income" and the calculations regarding the
5 presumption of abuse be presented in conjunction with the
6 schedules of current income and current expenses required by §
7 521. Since the statute authorizes "adjustments of current
8 monthly income," the statement of "current monthly income" on a
9 form that does not attempt to capture such adjustments does not
10 mean that there cannot be "adjustments of current monthly income"
11 to reflect reality when "special circumstances" exist.

12 "Current monthly income" and the § 707(b) abuse calculations
13 spill over to the chapter 13 plan confirmation provisions under
14 § 1325. Since 1984, a plan that satisfies the basic § 1325(a)
15 plan confirmation standards nevertheless may not, by virtue of
16 § 1325(b), be confirmed over objection of the chapter 13 trustee
17 or the holder of an allowed unsecured claim unless either the
18 objecting creditor is being paid in full or all of the debtor's
19 "projected disposable income" is committed to the plan for the
20 requisite period. 11 U.S.C. § 1325(b). Also since 1984,
21 § 1325(b) has contained a definition of "disposable income," but
22 until 2005 that definition focused on "income which is received
23 by the debtor and which is not reasonably necessary to be
24 expended" for maintenance and support. 11 U.S.C. § 1325(b)(2)
25 (repealed 2005).

26 The innovation in 2005 for § 1325(b)(2) came in two parts.
27 First, the definition of "disposable income" was revised by
28 substituting "current monthly income" in place of "income which

1 is received by the debtor." The friction generated by the
2 introduction of this disconnect between present and past ignited
3 the present debate that seems to be boiling down to a
4 disagreement about whether the word "projected" is an adjective
5 applied to a term of art ("disposable income") or instead whether
6 "projected" is part of an integrated term ("projected disposable
7 income") with a meaning different than "disposable income."

8 The second facet of the 2005 revision of § 1325(b)(2) was
9 the addition of the requirement in § 1325(b)(3) that allowable
10 expenses under § 1325(b)(2) for over-median income debtors be
11 "determined in accordance with subparagraphs (A) and (B) of
12 section 707(b)(2)." Of course, § 707(b)(2)(B) is precisely the
13 provision that authorizes "adjustments of current monthly income"
14 based on present facts. In other words, it is at least a
15 plausible interpretation (I do not pretend it is perfect) that
16 "current monthly income" as used in § 1325(b) can be adjusted
17 under the mechanism provided by § 707(b)(2)(B) to recognize
18 substantial and non-transitory changes in income.

19 It is no objection that § 1325(b)(3) applies only for over-
20 median income debtors. The language is certainly mandatory for
21 over-median income debtors ("Amounts reasonably necessary to be
22 expended under paragraph (2) shall be determined . . ."), but a
23 court presumably would have discretion (i.e. "may be determined")
24 to apply similar analysis to other debtors. The more accurate
25 view of § 1325(b)(3) is that it is mandatory for over-median
26 income debtors, but optional for under-median income debtors.

27 It is perhaps more of an objection that the incorporation of
28 § 707(b)(2)(B) into § 1325(b)(3) is done in terms that refer only

1 to the expense side of the equation. That would have some force
2 if Congress had imported only § 707(b)(2)(A), which deals only
3 with expenses. It loses force when one looks at the
4 incorporation of § 707(b)(2)(B), which deals exclusively with
5 rebutting a presumption of abuse (that can only arise after
6 "current monthly income" netted with § 707(b)(2)(A) expenses).
7 Since the presumption of abuse that is addressed by
8 § 707(b)(2)(B) has literally nothing to do with chapter 13, the
9 specific incorporation of § 707(b)(2)(B) into § 1325(b)(3) must
10 mean that the provisions for making "adjustments" based on
11 "special circumstances" is what is being imported without the
12 irrelevant presumption of abuse rebuttal provisions. Congress
13 must have meant something by specifying § 707(b)(2)(B); what
14 else, besides "adjustment" safety valve, could it have been? It
15 is difficult to imagine how only snippets of the special
16 circumstances adjustments would be applicable. If this
17 analysis were to be applied, then the problem presented by this
18 appeal would be solved. The debtor has had a substantial and
19 non-transitory increase in income that necessitates a
20 § 707(b)(2)(B) "adjustment of current monthly income" based on
21 "special circumstances" to an amount substantially higher than
22 the \$2,666.67 upon which he relied to propose a \$10,822.20 plan.
23 Hence, the court correctly sustained the § 1325(b) objection to
24 confirmation and correctly dismissed the case when the debtor
25 chose not to file another plan that took into account the
26 appropriate "adjustments of current monthly income."

27

28

1 B

2 Further support for the construction outlined above is found
3 at § 1329(a), which provides for modification of a plan after
4 confirmation.

5 At any time between confirmation and completion of payments
6 under a chapter 13 plan, the debtor, the trustee, or an unsecured
7 creditor may request a plan modification that, among other
8 possibilities, increases or reduces payments or extends or
9 reduces the time for making payments. 11 U.S.C. § 1329(a)(1).
10 Such modifications typically are based on changes in income.

11 While a modification must meet the plan confirmation
12 requirements of § 1325(a), which is incorporated by § 1329(b)(1)
13 ("the requirements of section 1325(a) of this title apply to any
14 modification under subsection (a)"), it is significant that
15 § 1325(b) does not apply to § 1329 modifications. Sunahara v.
16 Burchard (In re Sunahara), 326 B.R. 768, 781-82 (9th Cir. BAP
17 2005).

18 In sum, the construction of the statute that discerns the
19 ability to adjust "current monthly income" based on "special
20 circumstances" is a plausible reading of the relevant provisions
21 of the Bankruptcy Code and accounts for both upward and downward
22 adjustments to "current monthly income."
23

24 IV

25 An alternative basis upon which we could affirm this appeal
26 focuses on the basic confirmation requirements specified by
27 § 1325(a).

28 Accepting at face value the debtor's argument that the

1 \$10,822.20 he proposes to pay into the plan is all that he must
2 do under § 1325(b), the plan nevertheless must meet all
3 confirmation requirements of § 1325(a).

4 Since it is apparent that the debtor actually could afford
5 to pay about \$35,000 into a plan during the applicable commitment
6 period, the question becomes whether the plan has been "proposed
7 in good faith" as required by § 1325(a)(3).

8 As we explained in Sunahara, the § 1325(a)(3) analysis,
9 among other things, "necessarily requires an assessment of a
10 debtor's overall financial condition including, without
11 limitation, the debtor's current disposable income, the
12 likelihood that the debtor's disposable income will significantly
13 increase due to increased income or decreased expenses over the
14 remaining term." Sunahara, 326 B.R. at 781-82.

15 When the record establishes that there is a material
16 disparity between what would be paid into a plan and what could
17 be paid into a plan, the question of what should be paid into a
18 plan becomes part of the confirmation process. A tool in the
19 toolbox for dealing with this situation is the "good faith" plan
20 confirmation requirement.

21 It is credible to argue that the debtor's plan is an
22 intentionally passive-aggressive, "gotcha" response to the
23 straightjacket that was nominally imposed by the 2005 amendments.
24 While to some it smacks of delicious irony, there is a point of
25 degree at which a debtor's proposed chapter 13 plan can move into
26 the realm of overreaching that is lacking in "good faith."

27 In this context, it is significant that in the 2005
28 amendments Congress restated the requirement that debtors file a

1 schedule of "current income and current expenditures" in cases
2 under all chapters. 11 U.S.C. § 521(a)(1)(B)(ii). The provision
3 that requires additional reporting of "current monthly income" in
4 connection with the schedule of current income and current
5 expenses appears only in chapter 7. 11 U.S.C. § 707(b)(2)(C).

6 Since Congress would not have required reporting of current
7 information regarding income and expenses if such information was
8 intended to be irrelevant, it follows that such information may
9 be considered in the § 1325(a) "good faith" analysis required for
10 chapter 13 plan confirmation.

11 Accordingly, the bankruptcy court's refusal to confirm the
12 plan that would pay less than one-third of what the schedules of
13 current income and expenses (Schedules I and J) suggest the
14 debtor could pay, may be affirmed on the basis that the plan was
15 not confirmable because the plan proponent did not by a
16 preponderance of evidence establish that the plan was proposed in
17 "good faith" as required by § 1325(a)(3).

18 This analysis, however, is less attractive than the analysis
19 suggested above because it does not account for how one would
20 deal with the debtor whose actual income has fallen below
21 "current monthly income" in a manner that would permit an
22 unsecured creditor animated by non-economic factors to block plan
23 confirmation even though the debtor still has sufficient income
24 to fund a chapter 13 plan and may desperately need to confirm
25 such a plan in order to cure, for example, a mortgage default
26 during the life of the plan.

* * *

1
2 Both of these alternative theories would support affirmance
3 and appear to me to be more firmly grounded in the language of
4 the statute than the approach of cutting the Gordian Knot. As
5 noted at the outset, however, if I had to choose between the
6 majority's approach and the alternative that "current monthly
7 income" creates a straightjacket in which there is no flexibility
8 for dealing with the actual facts of a particular case, I would
9 agree with the substantial body of cases that go with cutting the
10 knot.

11 Accordingly, I concur.
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