

Mock Appellate Argument: “Projected” Disposable Income Issue

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U.S. District Court Judges (E.D. Mich.)

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Hon. George C. Steeb

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re FLOYD ARMSTRONG

Debtor.

UNITED STATES TRUSTEE,

Appellant,

v.

FLOYD ARMSTRONG,

Debtor-Appellee.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR DEBTOR-APPELLEE

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STATEMENT OF JURISDICTION

The bankruptcy court had jurisdiction over the debtor's bankruptcy case under 28 U.S.C. §§ 157(a) and (b), and 1334(a). The bankruptcy court granted the confirmation of the debtor's Chapter 13 plan, entering an order holding that the debtor's projected disposable income under §1325(b)(1) of the Bankruptcy Code is computed by multiplying the debtor's disposable income, as defined in §1325(b)(2), by the number of months in the Chapter 13 plan, with no other adjustments. The United States Trustee timely filed a notice of appeal of the bankruptcy court's order to the United States Court of Appeal for the Sixth Circuit. This court has jurisdiction of the appeal of the bankruptcy court's order confirming the debtor's plan.

STATEMENT OF THE ISSUE

Whether the bankruptcy court erred in holding that the debtor's projected disposable income under §1325(b)(1) of the Bankruptcy Code is determined by multiplying the debtor's disposable income, as defined in §1325(b)(2), by the number of months in the Chapter 13 plan, with no other adjustments.

STATEMENT OF CASE

On November 28, 2005, Floyd Armstrong filed a bankruptcy case under Chapter 13 in the Eastern District of Michigan, Southern Division. Subsequent to the filing of the bankruptcy case, the bankruptcy court entered an order confirming the debtor's Chapter 13 plan. The parties asked the bankruptcy court to certify its order for direct interlocutory appeal to the court of appeals under 28 U.S.C. § 158(d)(2). The bankruptcy court ordered that the matter be certified and the Sixth Circuit granted permission to appeal on October 30, 2006.

STATEMENT OF FACTS

The facts of this case are undisputed, and neither party seeks review of them. The debtor, Floyd Armstrong, filed a Chapter 13 petition on November 28, 2005. Accompanying his petition were forms disclosing his income and expenses and computing those figures in different ways. The first set of forms, the traditional schedules I and J, showed a total combined monthly income of \$4,000 and total monthly expenses of \$3,900, for a monthly net income of \$100. The second form, Form 22C, which is a new form developed for use after the enactment of the BAPCPA, showed the debtor's statutorily defined "current monthly income" to be \$6,000 (\$72,000 annually), which after computing deductions allowable under BAPCPA, showed monthly disposable income of \$100. The debtor's Schedule I revealed that the debtor had recently been promoted and, as of the petition date, after taxes took home \$400 more each month than he had during the six (6) month period preceding the filing of his case.

In light of his pre-raise disposable income, the debtor filed a Chapter 13 plan that called for him to make monthly \$100 plan payments. The United States Trustee objected, arguing that the debtor's disposable income projected over the next sixty (60) months included the additional \$400. The debtor countered that his disposable income was \$100, and that if that the \$100 income was projected through the plan period, he would satisfy the requirement of § 1325(b)(1)(B) that "all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." That is, "all" of his projected disposable income was \$6,000, so by paying that much, he was complying with the Code, and his plan should be confirmed.

The bankruptcy court agreed with the debtor. Citing “the plain words of the statute,” the bankruptcy court noted that Congress, in BAPCPA, had focused the definition of “disposable income” on “current monthly income.” The bankruptcy court pointed out that the definition, in § 1325(b)(2), applies in “this subsection,” and that the term appears nowhere else but in § 1325(b)(1)(B), which refers to “projected disposable income.” *Id.* Thus, “[u]nless the definition applies to ‘projected disposable income,’ it has no meaning.” *Id.*

The Chapter 13 Trustee, not a party to this appeal, argued that a simple historical number could not be “projected.” The Court rejected this argument, observing that one would just “apply the current monthly income amount over the applicable commitment period.” It is true, the bankruptcy court admitted, that this computation might bear little relation to actual income available to the debtor during the plan period, and that schedules I and J might provide a better measure. Nevertheless, that is what Congress called for, as “ironic and unfortunate” as that may be.

The parties asked the bankruptcy court to certify its order for direct interlocutory appeal to the court of appeals under 28 U.S.C. § 158(d)(2). The bankruptcy court ordered that the matter be certified and the Sixth Circuit granted permission to appeal on October 30, 2006.

ARGUMENT

A. INTRODUCTION

The Bankruptcy Abuse and Prevention and Consumer Protection Act (BAPCPA), effective October 17, 2005, introduced a new definition of a Chapter 13 debtor’s disposable income and made that definition the measure of what must be paid to the debtor’s *unsecured creditors*.

Prior to October 17, 2005, §1325 provided:

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

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

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended –

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

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

BAPCPA added a definition of "disposable income" to §1325 which says **disposable income means the debtor's current monthly income.**

(b)(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended –

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

(ii) for charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3) [11 U.S.C.S. §548(d)(3)] to a qualified religious or charitable entity or organization (as defined in section 548(d)(4) [11 U.S.C.S. §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

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

Current monthly income (CMI), in turn, is statutorily defined in §101(10A)

The term “current monthly income” –

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on –

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii) [11 U.S.C.S. §521(a)(1)(B)(ii)]; or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii) [11 U.S.C.S. §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 [42 U.S.C.S. §§301 et seq.], 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 [18 U.S.C.S. §2331]) or domestic terrorism (as defined in section 2331 of title 18 [18 U.S.C.S. §2331]) on account of their status as victims of such terrorism.

The question is, then, does the word “projected”, which modifies “disposable income”, permit or require the court to discard CMI as the measure of what the debtor must commit to his unsecured creditors in favor of some other formula or analysis found nowhere in the statute.

Reported cases have addressed the relationship between the debtor's projected disposable income and the figures found on schedules I and J. This case focuses on the income side of projected disposable income. Many of the reported cases have addressed the expense side of the "projected disposable income" typically when confronted with net monthly income (the difference between schedule I income and schedule J expenses) that is higher than the figure on line 58 of Form B22c.

This debtor's CMI puts him below the median income for single Michiganders. The court, in its desire to find and squeeze the can-pay debtor, looked to CMI, and not to the debtor's schedule I income to establish the monthly income from which the debtor's reasonable living expenses should be deducted. As the debtor's income on the date of the filing was less than his CMI, the court elected to discard the schedule I figure and use the statutory formula.

The bankruptcy court justified using the statutory definition of the debtor's CMI as set forth in Form 22c as the applicable CMI without including the interpretation and inclusion of income set forth on the Debtor's schedule I.

B. THE PLAIN LANGUAGE OF THE STATUTE PROVIDES A CLEAR DEFINITION OF DISPOSABLE INCOME

The language of §1325(b)(2) defines "disposable income" as being the debtor's current monthly income. Current monthly income is an average of income for the recent past, chosen by Congress to replace the prior reliance on schedules I and J, which provided a snapshot of the debtor's income and expenses on the date of filing.

In interpreting statutes, courts are instructed to utilize the plain meaning of the words of a statute. When the "statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Hartford*

Underwriters Ins. Co. v. Union Planters Bank, N.C., 530 U.S. 1, 6 (2000) (internal quotations omitted.) Each portion of the statute is to be given meaning.

Congress specifically added to §1325(b) a definition of “disposable income” not present in the section before BAPCPA. The language is clear and it provides a formula for determining what a Chapter 13 debtor must pay to his unsecured creditors: CMI minus specified adjustments minus reasonable living expenses = disposable income.

Courts dissatisfied with the application of the statute as written have seized the word “projected” as the lever to ignore the directive to use CMI as the debtor’s disposable income. Considering the issue, the court in *In re Jass*, 340 B.R. 411 (Bankr. UT 2006) found that the statutory definition was only the starting point for the analysis, creating a presumptively correct income figure.

Jass presented the converse of the factual situation in the present case: in *Jass*, the debtors’ realized a decline in income since the six months prior to the filing of the case. The *Jass* court held that CMI was presumptively the debtor’s disposable income. The analysis however is unsound. Nowhere in the statutory language is the court directed to conduct an inquiry beyond the information set forth in Form B22.

Congress has established that it knows how to create a presumption, if that is what it intended. See §§523(a)(2)(C)(I) and 707(b)(2)(A). Section 1325(b)(2) contains no such language. As a result, courts must apply the plain language of the statute and look to CMI to determine the debtor’s income for the purposes of the disposable income calculation.

Section 1325(b)(2) provides that “for the purposes of this subsection, the term disposable income means current monthly income . . .” The only place in the subsection that “disposable

income” appears in §1325(b)(1)(B). If disposable income does not mean current monthly income there, it is utter surplusage. An interpretation that replaces the precise definition of current monthly income found in §101(10A) with some variant or the product of schedule I minus schedule J violates the canon of interpretation that every word of the statute must be given its plain meaning.

C. CMI PROVIDES THE DATA THAT IS PROJECTED

Courts uncomfortable with the application of a definition of disposable income based on CMI have seized on the word “projected” to avoid the application of the statute as written.

Is there a meaning of “projected” which directs courts to schedules I and J or any other source or period other than or in addition to the six months prior to filing for the measure of the debtor’s income? The answer is no. “Projected” is not new; it existed in the pre-BAPCPA Code. It is the definition of what income figure is “projected” that is new; BAPCPA directs us to project CMI.

The verb “project” is defined as “[t]o calculate, estimate, or predict (something in the future), based on present data or trends: projecting the next year’s expenses.” *The American Heritage Dictionary of the English Language*, 4th Ed., (2004).

In defining disposable income as the debtor’s CMI, Congress simply *mandated the data* that was to be used in calculating disposable income: that data is found in the debtor’s CMI. *Kolb*, 2007 Bankr. Lexis 993; *Berger*, 2007 Bankr. Lexis 2028.

To use the income data for the past six months to project the debtor’s income over the life of the plan is no less analytically sound than to project the snapshot-in-time data found in schedules I and J as was done before BAPCPA. It is different from the approach of the past; the difference is required by the language of amended §1325(b)(2). Before BAPCPA, “projected disposable income was a ‘forward looking concept, requiring bankruptcy courts to ‘project’ the debtor’s income into

the future,' it has been "transformed by new §1325(b)(2)." Keith M. Lundin, *Section by Section Analysis of Chapter 13 After BAPCPA*, NC Bar Assoc. 28th Annual Bankr. Inst. 31 (2005). *Alexander*, 344 B.R. 742, 748 (Bankr. E.D.N.C. 2006).

The transformation in the concept of projected disposable income into a clearly elucidated formula to determine payments to unsecured creditors furthers an articulated goal of BAPCPA predictability and objectivity.

"Instead of simply looking at the debtor's actual income and expenses, these [2005] amendments in many cases attempt to create a bright line test to determine whether a debtor's plan is committing all disposable income. By creating a bright line test, Congress even more clearly indicated that it intended that section 1325(b), rather than the good faith test, to be the measure of whether the debtor was committing sufficient income to the plan. 8 *COLLIER ON BANKRUPTCY P 1325.08[1]* (15th ed. rev. 2005)." *Barr*, 341 B.R. 181, 184 (Bankr. M.D.N.C. 2006).

The use of recent historic data to project the future is neither intellectually unsound nor absurd: in fact it is a common analytic tool. Further, it is the tool chosen by Congress.

"If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent." "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." *United States v. Granderson*, 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994)(concurring opinion). This allows both of our branches to adhere to our respected, and respective, constitutional roles. In the meantime, we must determine intent from the statute before us." *Lamie*, 540 U.S. 526, 542 (2004).

D. USE OF CURRENT MONTHLY INCOME TO PROJECT PAYMENTS TO UNSECURED CREDITORS IS NOT ABSURD

Courts are relieved of adherence to the plain meaning of the words of a statute only when those words produce a result that is absurd. The use of the recent past, the six months prior to filing, to fix the debtor's obligation to unsecured creditors is not absurd, it is only new and different.

An absurd result is one that is "ridiculously unreasonable, unsound, or incongruous". *Merriam Webster Dictionary online*.

"[A]bsurdity cannot mean that BAPCPA was awkwardly written, does not reach some of the understood goals of and/or creates unintended consequences or fails to embrace the same principles as the prior law. In order for the federal courts to exercise their limited role in interpreting federal statutes such as BAPCPA, none of these factors can rise to the level of absurdity." *Kolb*.

The application of Congress's formula at various times benefits either the debtor, if the debtor has experienced an increase in income, or it may benefit the creditors in instances where income decreases as in *Kolb*. These disparate results do not make the result absurd, they are simply an anticipated by-product of BAPCPA and reflect a change from pre-BAPCPA practice. The court in *Berger* observed:

"From a policy perspective, rigid application of the disposable income formula can lead to seemingly inequitable results. This case offers a good example. Debtors' actual funds available to pay unsecured creditors exceeds the Form 22C amount by more than \$1,000 per month. Thus, the unsecured creditors are shortchanged and Debtors receive a windfall. In different circumstances, if a debtor's income drops dramatically or his expenses increase substantially post-petition, his plan may be unconfirmable pursuant to §1325(a)(6) because he cannot feasibly pay the amount dictated by the formula. Nevertheless, the formula "represents, by the definition's plain language, the policy judgment of Congress of how [projected disposable] income should be determined in the context of Chapter 13 after BAPCPA." *Kolb, 2007 Bankr. LEXIS 993, 2007 WL 960135, at 6*; see also *Brady, 361 B.R. 765, 2007 WL 549359, at 6* (Congress's chosen method of determining the debtors' disposable income must be respected.)."

Berger, 2007 Bankr. Lexis 2028 at 12.

The decision in the bankruptcy court in the present case impermissibly jettisons the Congressional scheme for determining the debtor's disposable income and replaces it with a patchwork rule that requires the court to "predict" the debtor's future income in furtherance of forcing the can-pay debtor to pay. However, Judge Waldron reminds us that "Congress, of course, can exercise its discretion in determining "those who can pay - should pay"; however, this concept *only exists within the confines of the language of the 2005 Act.*" *Sorrell*, 359 B.R. 167, 178 (S.D. OH 2007) (emphasis added).

The court is not entitled to craft its own formula to correct perceived defects in the one provided by Congress. See *Union Bank v. Wolas*, 502 U.S. 151 (1991) ("Whether Congress has wisely balanced the sometimes conflicting policies . . . is not a question we are authorized to decide").

CONCLUSION

The decision of the bankruptcy court adopting the debtor's currently monthly income as set forth on Form 22C should be affirmed.

STATEMENT OF JURISDICTION

The bankruptcy court had jurisdiction over the debtor's bankruptcy case under 28 U.S.C. §§ 157(a) and (b), and 1334(a). The bankruptcy court granted the confirmation of the Debtor's chapter 13 plan by order entered an order holding that the debtor's projected disposable income under §1325(b)(1) of the Bankruptcy Code is computed by multiplying the debtor's disposable income, as defined in §1325(b)(2), by the number of months in the chapter 13 plan, with no other adjustments. The United States Trustee timely filed a notice of appeal of the Bankruptcy Court's order to the United States Court of Appeal for the Sixth Circuit. This Court has jurisdiction of the appeal of the bankruptcy court's order confirming the Debtor's plan.

STATEMENT OF THE ISSUE

Whether the bankruptcy court erred in holding that the debtor's projected disposable income under §1325(b)(1) of the Bankruptcy Code is determined by multiplying the debtor's disposable income, as defined in §1325(b)(2), by the number of months in the chapter 13 plan, with no other adjustments.

STATEMENT OF CASE

On November 28, 2005, Floyd Armstrong filed a bankruptcy case under Chapter 13 in the Eastern District of Michigan, Southern Division. Subsequent to the filing of the bankruptcy case, the bankruptcy court entered an order confirming the Debtor's chapter 13 plan. The parties asked the bankruptcy court to certify its order for direct interlocutory appeal to the court of appeals under 28 U.S.C. § 158(d)(2). The bankruptcy court ordered that the matter be certified and the Sixth Circuit granted permission to appeal on October 30, 2006.

STATEMENT OF FACTS

The facts of this case are undisputed, and neither party seeks review of them. The debtor, Floyd Armstrong, filed a chapter 13 petition on November 28, 2005. Accompanying his petition

were forms disclosing his income and expenses and computing those figures in different ways. The first set of forms, the traditional Schedules I and J, showed a total combined monthly income of \$4,000 and total monthly expenses of \$3,900, for a monthly net income of \$100. The second form, Form 22C, which is a new Form developed for use after the enactment of the BAPCPA, showed the debtor's statutorily defined "current monthly income" to be \$6,000 (\$72,000 annually), which after computing deductions allowable under BAPCPA, showed monthly disposable income of \$100. The Debtor's Schedule I revealed that the Debtor had recently been promoted and as of the petition date took home after taxes \$400 more each month than he had during the six (6) month period preceding the filing of his case.

In light of his pre-raise disposable income, the debtor filed a chapter 13 plan that called for him to make monthly \$100 plan payments. The United States Trustee objected, arguing that the debtor's disposable income projected over the next sixty (60) months included the additional \$400. The debtor countered that his disposable income was \$100, and that if that the \$100 income was projected through the plan period, he would satisfy the requirement of section 1325(b)(1)(B) that "all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." That is, "all" of his projected disposable income was \$6,000, so by paying that much, he was complying with the Code, and his plan should be confirmed.

The bankruptcy court agreed with the Debtor. Citing "the plain words of the statute," the bankruptcy court noted that Congress, in BAPCPA, had focused the definition of "disposable income" on "current monthly income." The bankruptcy court pointed out that the definition, in section 1325(b)(2), applies in "this subsection," and that the term appears nowhere else but in section 1325(b)(1)(B), which refers to "projected disposable income." *Id.* Thus, "[u]nless the

definition applies to ‘projected disposable income,’ it has no meaning.” Id.

The Chapter 13 Trustee, not a party to this appeal, argued that a simple historical number could not be “projected.” The Court rejected this argument, observing that one would just “apply the current monthly income amount over the applicable commitment period.” It is true, the bankruptcy court admitted, that this computation might bear little relation to actual income available to the debtor during the plan period, and that Schedules I and J might provide a better measure. Nevertheless, that is what Congress called for, as “ironic and unfortunate” as that may be.

The parties asked the bankruptcy court to certify its order for direct interlocutory appeal to the court of appeals under 28 U.S.C. § 158(d)(2). The bankruptcy court ordered that the matter be certified and the Sixth Circuit granted permission to appeal on October 30, 2006.

ARGUMENT

A. INTRODUCTION

The Bankruptcy Abuse and Prevention and Consumer Protection Act (BAPCPA), effective October 17, 2005, introduced a new definition of a Chapter 13 debtor’s disposable income and made that definition the measure of what must be paid to the debtor’s *unsecured creditors*.

Prior to October 17, 2005, §1325 provided:

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

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

in will (B) the plan provides that all of the debtor’s projected disposable income to be received the three-year period beginning on the date that the first payment is due under the plan be applied to make payments under the plan.

(2) For purposes of this subsection, “disposable income” means income which is received

by the debtor and which is not reasonably necessary to be expended –

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

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

BAPCPA added a definition of “disposable income” to §1325 which says **disposable**

income means the debtor’s current monthly income.

(b)(2) For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended –

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

(ii) for charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3) [11 U.S.C.S. §548(d)(3)] to a qualified religious or charitable entity or organization (as defined in section 548(d)(4) [11 U.S.C.S. §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

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

Current monthly income (CMI), in turn, is statutorily defined in §101(10A)

The term “current monthly income” –

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on –

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii) [11 U.S.C.S. §521(a)(1)(B)(ii)]; or

(ii) the date on which current income is determined by the court for purposes of

this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii) [11 U.S.C.S. §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 [42 U.S.C.S. §§301 et seq.], 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 [18 U.S.C.S. §2331]) or domestic terrorism (as defined in section 2331 of title 18 [18 U.S.C.S. §2331]) on account of their status as victims of such terrorism.

The question is, then, does the word “projected”, which modifies “disposable income”, permit or require the court to discard CMI as the measure of what the debtor must commit to his unsecured creditors in favor of some other formula or analysis found nowhere in the statute.

Reported cases have addressed the relationship between the debtor's projected disposable income and the figures found on Schedules I and J. This case focuses on the income side of projected disposable income. Many of the reported cases have addressed the expense side of the “projected disposable income” typically when confronted with net monthly income (the difference between Schedule I income and Schedule J expenses) that is higher than the figure on line 58 of Form B22c.

This debtor's CMI puts him below the median income for single Michiganders. The court, in its desire to find and squeeze the can-pay debtor, looked to CMI, and not to the debtor's schedule I income to establish the monthly income from which the debtor's reasonable living expenses should be deducted. As Mr. Armstrong's income on the date of the filing was less than his CMI, the court elected to discard the Schedule I figure and use the statutory formula.

The bankruptcy court justified using the statutory definition of the debtor's CMI as set forth in Form 22c as the applicable CMI without including the interpretation and inclusion of income set forth on the Debtor's Schedule I.

B. THE PLAIN LANGUAGE OF THE STATUTE PROVIDES A CLEAR

DEFINITION OF DISPOSABLE INCOME

The language of §1325(b)(2) defines “disposable income” as being the debtor’s Current Monthly Income; Current Monthly Income is an average of income for the recent past, chosen by Congress to replace the prior reliance on Schedules I and J, which provided a snapshot of the debtor’s income and expenses on the date of filing.

In interpreting statutes, courts are instructed to utilize the plain meaning of the words of a statute. When the “statute’s language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms.” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.C.*, 530 U.S. 1, 6 (2000) (internal quotations omitted.) Each portion of the statute is to be given meaning.

Congress specifically added to §1325(b) a definition of “disposable income” not present in the section before BAPCPA. The language is clear and it provides a formula for determining what a Chapter 13 debtor must pay to his unsecured creditors: CMI minus specified adjustments minus reasonable living expenses = disposable income.

Courts dissatisfied with the application of the statute as written have seized the word “projected” as the lever to ignore the directive to use CMI as the debtor’s disposable income. The *Jass* court found that the statutory definition was only the starting point for the analysis, creating a presumptively correct income figure. *Jass*, 340 B.R. 411 (Bankr. UT 2006).

Jass presented the converse of the factual situation in the present case: in *Jass*, the debtors’ realized a decline in income since the six months prior to the filing of the case. The *Jass* court held that CMI was presumptively the debtor’s disposable income. The analysis however is unsound. Nowhere in the statutory language is the court directed to conduct an inquiry beyond the information set forth in Form B22.

Congress has established that it knows how to create a presumption, if that is what it

intended. See §523(a)(2)(C)(I) and §707(b)(2)(A). Section 1325(b)(2) contains no such language. As a result, courts must apply the plain language of the statute and look to CMI to determine the debtor's income for the purposes of the disposable income calculation.

Section 1325(b)(2) provides that “for the purposes of this subsection, the term disposable income means current monthly income . . .” The only place in the subsection that “disposable income” appears is in §1325(b)(1)(B). If disposable income does not mean current monthly income there, it is utter surplusage. An interpretation that replaces the precise definition of current monthly income found in §101(10A) with some variant or the product of Schedule I minus Schedule J violates the canon of interpretation that every word of the statute must be given its plain meaning.

C. CMI PROVIDES THE DATA THAT IS PROJECTED

Courts uncomfortable with the application of a definition of disposable income based on CMI have seized on the word “projected” to avoid the application of the statute as written.

Is there a meaning of “projected” which directs courts to Schedules I and J or any other source or period other than or in addition to the six months prior to filing for the measure of the debtor's income? The answer is no. “Projected” is not new; it existed in the pre-BAPCPA Code. It is the definition of what income figure is “projected” that is new; BAPCPA directs us to project CMI.

The verb “project” is defined as “[t]o calculate, estimate, or predict (something in the future), based on present data or trends: projecting the next year's expenses.” *The American Heritage Dictionary of the English Language*, 4th Ed., (2004).

In defining disposable income as the Debtor's CMI, Congress simply *mandated the data* that was to be used in calculating disposable income: that data is found in the debtor's CMI.

Kolb, 2007 Bankr. Lexis 993; *Berger*, 2007 Bankr. Lexis 2028.

To use the income data for the past six months to project the debtor's income over the life of the plan is no less analytically sound than to project the snapshot-in-time data found in Schedules I and J as was done before BAPCPA. It is different from the approach of the past; the difference is required by the language of amended §1325(b)(2). Before BAPCPA, "projected disposable income was a 'forward looking concept, requiring bankruptcy courts to 'project' the debtor's income into the future,' it has been "transformed by new §1325(b)(2)." Keith M. Lundin, *Section by Section Analysis of Chapter 13 After BAPCPA*, NC Bar Assoc. 28th Annual Bankr. Inst. 31 (2005)." *Alexander*, 344 B.R. 742, 748 (Bankr. E.D.N.C. 2006).

The transformation in the concept of projected disposable income into a clearly elucidated formula to determine payments to unsecured creditors furthers an articulated goal of BAPCPA: predictability and objectivity.

"Instead of simply looking at the debtor's actual income and expenses, these [2005] amendments in many cases attempt to create a bright line test to determine whether a debtor's plan is committing all disposable income. By creating a bright line test, Congress even more clearly indicated that it intended that section 1325(b), rather than the good faith test, to be the measure of whether the debtor was committing sufficient income to the plan. 8 *COLLIER ON BANKRUPTCY P 1325.08[1]* (15th ed. rev. 2005)." *Barr*, 341 B.R. 181, 184 (Bankr. M.D.N.C. 2006).

The use of recent historic data to project the future is neither intellectually unsound nor absurd: in fact it is a common analytic tool. Further, it is the tool chosen by Congress.

"If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent." "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." *United States v. Granderson*, 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994)(concurring

opinion). This allows both of our branches to adhere to our respected, and respective, constitutional roles. In the meantime, we must determine intent from the statute before us.”

Lamie, 540 U.S. 526, 542 (2004).

D. USE OF CURRENT MONTHLY INCOME TO PROJECT PAYMENTS TO UNSECURED CREDITORS IS NOT ABSURD

Courts are relieved of adherence to the plain meaning of the words of a statute only when those words produce a result that is absurd. The use of the recent past, the six months prior to filing, to fix the debtor’s obligation to unsecured creditors is not absurd, it is only new and different.

An absurd result is one that is “ridiculously unreasonable, unsound, or incongruous”.

Merriam Webster Dictionary online.

“[A]bsurdity cannot mean that BAPCPA was awkwardly written, does not reach some of the understood goals of and/or creates unintended consequences or fails to embrace the same principles as the prior law. In order for the federal courts to exercise their limited role in interpreting federal statutes such as BAPCPA, none of these factors can rise to the level of absurdity.” *Kolb*.

The application of Congress’s formula at various time benefits either the debtor, if the debtor has experienced an increase in income or it may benefit the creditors in instances where income decreases as in *Kolb*. These disparate results do not make the result absurd, they are simply an anticipated by-product of BAPCPA and reflect a change from pre-BAPCPA practice. The court in *Berger* observed:

“From a policy perspective, rigid application of the disposable income formula can lead to seemingly inequitable results. This case offers a good example. Debtors’ actual funds available to pay unsecured creditors exceeds the Form 22C amount by more than \$1,000 per month. Thus, the unsecured creditors are shortchanged and Debtors receive a windfall. In

different circumstances, if a debtor's income drops dramatically or his expenses increase substantially post-petition, his plan may be unconfirmable pursuant to §1325(a)(6) because he cannot feasibly pay the amount dictated by the formula. Nevertheless, the formula "represents, by the definition's plain language, the policy judgment of Congress of how [projected disposable] income should be determined in the context of Chapter 13 after BAPCPA." *Kolb*, 2007 Bankr. LEXIS 993, 2007 WL 960135, at 6; see also *Brady*, 361 B.R. 765, 2007 WL 549359, at 6 (Congress's chosen method of determining the debtors' disposable income must be respected.)" *Berger*, 2007 Bankr. Lexis 2028 at 12.

The decision in the bankruptcy court in the present case impermissibly jettisons the Congressional scheme for determining the debtor's disposable income and replaces it with a patchwork rule that requires the court to "predict" the debtor's future income in furtherance of forcing the can-pay debtor to pay. However, Judge Waldron reminds us that "Congress, of course, can exercise its discretion in determining "those who can pay - should pay"; however, this concept *only exists within the confines of the language of the 2005 Act.*" *Sorrell*, 359 B.R. 167, 178 (S.D. OH 2007) (emphasis added).

The court is not entitled to craft its own formula to correct perceived defects in the one provided by Congress. See *Union Bank v. Wolas*, 502 U.S. 151 (1991) ("Whether Congress has wisely balanced the sometimes conflicting policies . . . is not a question we are authorized to decide").

CONCLUSION

The decision of the bankruptcy court adopting the debtor's currently monthly income as set forth on Form 22C should be affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re FLOYD ARMSTRONG

Debtor.

UNITED STATES TRUSTEE,

Appellant,

v.

FLOYD ARMSTRONG,

Debtor-Appellee.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR DEBTOR-APPELLEE

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