

THE APPLICABLE COMMITMENT PERIOD: A DEBTOR'S COMMITMENT TO A FIXED PLAN LENGTH

INTRODUCTION

With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act¹ (hereinafter "BAPCPA"), the Bankruptcy Code was substantially reformed to ensure that debtors who had the ability to pay would actually repay their creditors.² Changes in the chapter 13 confirmation requirements resulted in a split among courts over the interpretation of the required length a consumer must remain in chapter 13.³ The modified language of section 1325(b) now requires that upon the objection of an interested party, a plan must provide for "all of the debtor's projected disposable income to be received in the *applicable commitment period*["⁴ Although the language on its face is straightforward, substantial ambiguity exists based on the courts' interpretive meaning of the "applicable commitment period."⁵ The applicable commitment period is defined as three years, or if the debtor's current monthly income, when multiplied by twelve, is above the median family income, then the applicable commitment period is five years.⁶ The critical issue is whether section 1325(b) establishes a minimum time period during which a debtor must commit all his disposable income to a chapter 13 plan or does section 1325(b) simply set a minimum amount that must be paid to receive a discharge.

Litigation over the meaning of the applicable commitment period occurs in two principle circumstances: (1) where the debtor has no disposable income to pay unsecured creditors, and (2) where the debtor has some other means to pay back the

¹ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

² See Press Release, White House, President Signs Bankruptcy Abuse Prevention and Consumer Protection Act (April 20, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html#> [hereinafter White House Press Release].

³ David Gray Carlson, *Cars and Homes in Chapter 13 After the 2005 Amendments to the Bankruptcy Code*, 14 AM. BANKR. INST. L. REV. 301, 371 n.425 (2006) (stating "[c]ourts are divided as to whether debtor can end a plan early by paying" the equivalent of his disposable income for entire applicable commitment period). Compare *In re Fuger*, 347 B.R. 94, 99 (Bankr. D. Utah 2006) (holding applicable commitment period is not fixed plan length; it is a multiplier) with *In re McGuire*, 342 B.R. 608, 615 (Bankr. D. Mo. 2006) (suggesting applicable commitment period requires fixed commitment of time).

⁴ 11 U.S.C. § 1325(b)(1)(B) (2006) (emphasis added).

⁵ *In re Slusher*, 359 B.R. 290, 300-01 (Bankr. D. Nev. 2007) (indicating text of statute leads to multiple interpretations).

⁶ 11 U.S.C. § 1325(b)(4) (2006); see also Alane A. Becket and Thomas A. Lee, III, *Applicable Commitment Period: Time or Money?*, 25 AM. BANKR. INST. J. 16, 16 (March 2006).

A debtor's current monthly income is the average monthly income for the six months preceding the commencement of a debtor's case. 11 U.S.C. § 101(10A) (2006). The Debtor's spouse's income is also included in the current monthly income calculation when determining the applicable commitment period. Additionally, the median family income is based upon the median family income for the applicable state in which the plan is being confirmed. See 11 U.S.C. § 1325(b)(3) (2006).

projected disposable income earlier than a fixed interpretation of the applicable commitment would require.⁷ Within each of these situations there exists the potential for a debtor to use the Bankruptcy Code opportunistically and limit the unsecured creditor's ability to recover.⁸ In the case of a debtor with zero disposable income, the potential for gamesmanship exists where a debtor seeks to get around the Bankruptcy Code's limitation on the ability to re-file for bankruptcy (i.e., the serial filer situation). Under this idea, a debtor asserts that section 1325(b) only establishes a minimum repayment amount because the debtor would be able to exit chapter 13 quickly⁹ while not subjecting himself to the longer limitations imposed on receiving subsequent discharges after a chapter 7 discharge.¹⁰ In the second scenario, where the debtor has some additional income, abuse exists not where the debtor is willing to use exempt assets to pay his debt faster but where the debtor, post-confirmation, receives a windfall in income.¹¹ In this case, despite now having the ability to pay a larger percentage of their debt, debtors seek to prevent unsecured creditors from reclaiming this amount.

This Note contends that the applicable commitment period must be construed as a fixed plan length in order to best effectuate both the goals of the BAPCPA amendments and the overall policy of the Bankruptcy Code. In the context of the BAPCPA reforms, the language of section 1325(b) invokes a temporal ideology. While a temporal interpretation requires a debtor to remain in bankruptcy for an extended period of time, the applicable commitment period represents a

⁷ *In re Kolb*, 366 B.R. 802, 819 n.22 (Bankr. S.D. Ohio 2007) (describing two instances in which controversy over meaning of term "applicable commitment period" may arise). *See, e.g., In re Alexander*, 344 B.R. 742, 751 (Bankr. E.D.N.C. 2006) (pointing out several courts have held term "applicable commitment period" does not apply when debtor has no disposable income); *In re Zirtzman*, No. 06-00015, 2006 Bankr. LEXIS 2721, at *7-8 (Bankr. D. Iowa October 4, 2006) (noting some courts suggest that it "makes little sense to hold the debtor hostage for 60 months where the debtor can satisfy the requirements of § 1325(b)(1)(B) in a shorter period").

⁸ *See Slusher*, 359 B.R. at 304 (stating Congress did not intend chapter 13 to provide an alternative "lump-sum" payment, with an expanded discharge, without the use of pre-petition assets); *see also* Becket & Lee, *supra* note 6, at 44 (stating "wealthy debtors who might have exempt reserves . . . from which to fund immediate completion of a chapter 13 plan[,] would be able to prevent interested parties from reviewing and modifying debtor's plan).

⁹ Under a minimum payment view, once a debtor pays the required amount the debtor is entitled to a discharge. *In re Mathis*, 367 B.R. 629, 632-33 (Bankr. D. Ill. 2007) (determining once debtor pays off its debt under the plan it is entitled to discharge); *see In re Magnum*, 343 B.R. 185, 188 (Bankr. N.D. Ill. 2006) (finding that under section 1325 (b)(1)(B) trustee has no right to keep case open if all payments have been made).

¹⁰ The Bankruptcy Code imposes an eight year period between chapter 7 discharges. 11 U.S.C. § 727 (2006). For chapter 13 filers, the Bankruptcy Code requires a 2 year period between chapter 13 discharges and a 4 year period between a chapter 7 discharge and the subsequent chapter 13 discharge. *See* 11 U.S.C. § 1328 (2006).

¹¹ *See In re Briscoe*, No. 06-00458, 2007 Bankr. LEXIS 2943, at *56-57 (Bankr. D.D.C. September 4, 2007) (suggesting where debtor receives windfall, failure to increase plan payments may indicate debtor's "subjective intent not to make a good faith effort at repayment . . ."); *see also In re Nevins*, No. 02-37055DWS, 2005 Bankr. LEXIS 735, at *10-11 (Bankr. E.D. Pa. April 26, 2005) (noting debtor may abuse bankruptcy system after experiencing a windfall by trying to pay off creditors in order to prevent an increase in amount owed to creditors). A windfall may include, but is not limited to, the winning of the lottery or the receipt of an inheritance. *Nevins*, 2005 Bankr. LEXIS 735, at *10-11.

compromise between the competing interests of unsecured creditors and debtors. Using the applicable commitment period merely as a multiplicand would require a tenuous reading of the current statute for support. Moreover, a monetary holding is inconsistent with both prior practices and the legislative history. Therefore, a monetary holding would be inconsistent with the statute and the reasons for its enactment.

Part I of this Note discusses the current dichotomy in interpreting the meaning of the applicable commitment period. Part II focuses on the confirmation of chapter 13 plans prior to BAPCPA as circumstantial evidence of reforms made under BAPCPA. In Part III this Note will analyze the BAPCPA reform's statutory construction and legislative history to demonstrate that although a monetary interpretation can be read into the statute, the legislation overall indicates, that at confirmation, a chapter 13 plan should require a set plan length. Part IV considers policy arguments for both competing interpretations and determines that a temporal interpretation best prevents abusive practices by debtors while ensuring debtors who have the ability to repay, will make a good faith effort to pay back their unsecured creditors. Finally, Part V discusses the interplay between confirmation and post-confirmation requirements and the ability to subsequently modify the applicable commitment period.

I. THE DEBATE

The meaning of the term "applicable commitment period" is of critical importance to unsecured creditors because it will substantially affect the amount an unsecured creditor can recover under a confirmed plan. The overriding interest for an unsecured creditor is the ability to capture any increases in the debtor's disposable income.¹² As a result, typically it is the unsecured creditor that supports a fixed time period while the debtor argues that the applicable commitment period is a monetary requirement.¹³

A temporal interpretation of the applicable commitment period suggests that a plan can only be confirmed, where a party objects, if the plan requires the debtor to remain committed to the plan for a fixed number of years.¹⁴ Therefore, section

¹² See *In re Strickland*, No. 06-81060 C-13D, 2007 Bankr. LEXIS 508, at *3 (Bankr. M.D.N.C. February 13, 2007) (indicating central element of chapter 13 is that debtor must make an ongoing commitment to creditors in order to allow creditors ability to monitor debtor's income); see also *In re Shelton*, 370 B.R. 861, 864 (Bankr. N.D. Ga. 2007) (noting creditors look to debtor's disposable income to receive payment).

¹³ See *In re Brady*, 361 B.R. 765, 775 (Bankr. D. N.J. 2007) (stating debtor contends applicable commitment period does not require fixed duration); *In re Daniel*, 359 B.R. 320, 322 (Bankr. D. Kan. 2006) (noting debtor argues applicable commitment period is multiplier); see also *In re Beckerle*, 367 B.R. 718, 720 (Bankr. D. Kan. 2007) (indicating preference for monetary interpretation where Form B22C shows no disposable income because formula would result in no applicable commitment period).

¹⁴ *In re Dew*, 344 B.R. 655, 661 (Bankr. N.D. Ala. 2006) (indicating debtor can not exit plan earlier than applicable commitment period absent plan to pay unsecured creditors in full over shorter length of time); *Beckerle*, 367 B.R. at 719–20 (stating applicable commitment period language is described as time frame not

1325(b) sets the minimum length of time during which a debtor must remain in a chapter 13 plan and subjected to court supervision.¹⁵ Within the temporal analysis however, the courts are divided as to whether the applicable commitment period still applies when a debtor has zero disposable income.¹⁶

Under a monetary view, a debtor merely uses the applicable commitment period as a multiplier for monthly disposable income to arrive at the required amount of money that must be paid under a chapter 13 plan.¹⁷ Accordingly, an above the median debtor who can pay sixty months worth of disposable income faster than by making sixty monthly payments, may receive a discharge without waiting for the five year period to expire.¹⁸ The applicable commitment period therefore is merely a measure of the required minimum amount owed to unsecured creditors in order to receive a discharge.¹⁹

Although courts have adopted both views, a majority of courts have recognized a temporal view as the better interpretation for the term "applicable commitment period."²⁰ These decisions rely on BAPCPA's emphasis on a debtor's abuse of the bankruptcy system.²¹ As a result, the applicable commitment period represents a way to prevent abusive filings and also a way to provide debtors with the financial stability to recover from bankruptcy.²²

multiplier of months); *In re Pohl*, No. 06-41236, 2007 Bankr. LEXIS 1638, at *10 (Bankr. D. Kan. May 15, 2007) (agreeing with other decisions that applicable commitment period is a required time length).

¹⁵ See *Beckerle*, 367 B.R. at 720–21 (noting applicable commitment period is set time period in which debtor has certain financial reporting obligations); *Pohl*, 2007 Bankr. LEXIS 1638, at *11–13 (mentioning portion of time is necessary to give meaning to other sections of Bankruptcy Code).

¹⁶ See *infra* Section IV.C.

¹⁷ *In re Fuger*, 347 B.R. 94, 99 (Bankr. D. Utah 2006) (noting applicable commitment period only guarantees specified return and not fixed commitment); *In re McGillis*, No. HG 06-02982, 2007 Bankr. LEXIS 1733, at *91–92 (Bankr. D. Mich. May 18, 2007) (holding applicable commitment period is an arithmetic formula); *In re Mathis*, 367 B.R. 629, 635 (Bankr. N.D. Ill. 2007) (concluding applicable commitment period only requires minimum amount due to unsecured creditors and not minimum length of time).

¹⁸ *Fuger*, 347 B.R. at 99, 101. See Henry E. Hildebrand, III, *Unintended Consequences: BAPCPA and the New Disposable Income Test*, 25 AM. BANKR. INST. J. 14, 54 (March 2006).

¹⁹ *In re Luton*, 363 B.R. 96, 101 (Bankr. W.D. Ark. 2007) ("The applicable commitment period does indeed function as a multiplier in calculating the minimum amount to be paid to unsecured creditors.").

²⁰ See *Luton*, 363 B.R. at 99 (stating that majority of courts consider applicable commitment period as period of time); see also Transcript of Proceedings, *A Year After BAPCPA; How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Impacted Bankruptcy Practitioners, Lenders, Consumers, Turnaround Managers and Trustees*, Chapter 7 and 13 Issues: Means Testing and Good Faith at 28, American Bankruptcy Institute (October 16, 2006), available at <http://www.abiworld.org/pdfs/OneYearProgramTranscript.pdf> [hereinafter *A Year After BAPCPA*] ("[T]he vast majority . . . saying that that applicable commitment period is a temporal requirement.").

²¹ See *In re Slusher*, 359 B.R. 290, 303 (Bankr. D. Nev. 2007) (stating BAPCPA changes required those with ability to pay to actually repay); *In re Hylton*, No. 07-70320, 2007 Bankr. LEXIS 3023, at *17 (Bankr. W.D. Va. August 22, 2007) (indicating courts must be mindful that proposed plan does not abuse spirit or purpose of chapter 13); see also White House Press Release, *supra* note 2 (asserting pre-BAPCPA too many debtors walked away from their debts despite having ability to pay).

²² See *In re Pohl*, No. 06-41236, 2007 Bankr. LEXIS 1638, at *13 (Bankr. D. Kan. May 15, 2007); *In re Lanning*, No. 06-41037, 2007 Bankr. LEXIS 1639, at *31–32 (Bankr. D. Kan. May 15, 2007) (stating fixed plan length provides debtors with necessary financial discipline to gain "fresh start" from bankruptcy); White House Press Release, *supra* note 2 (indicating reforms made it harder for serial filers to abuse system); see

II. THE EVOLUTION OF THE CHAPTER 13 PLAN LENGTH

Historically, the treatment of creditors and debtors in bankruptcy proceedings has oscillated between a debtor or creditor focused law.²³ Congress's expressed purpose for chapter 13 was to provide a debtor with the ability to repay his debts over an extended period of time.²⁴ During each bankruptcy reform, legislators struggled to balance the desire to give debtors a "fresh start" from bankruptcy with the desire to protect creditors from abusive practices, including repeat filers.²⁵ While pre-BAPCPA bankruptcy laws provide debtors with a substantial amount of protection, bankruptcy reform was necessary to protect creditors from the surge of bankruptcy filings.²⁶ BAPCPA's creation of a minimum plan length, as a result, was a direct consequence of the prior bankruptcy reforms' failure to balance the interests of both the debtors and creditors.

Early limitations on a chapter 13 plan length, under section 1332(d), only established a maximum plan length and consequently provided insufficient protection for creditors.²⁷ Without a required minimum commitment to chapter 13, courts struggled with the ability to confirm a debtor's plan that only satisfied a debtor's obligation for home mortgages and car loans while providing unsecured creditors with nothing, despite a debtor having the ability to pay more.²⁸ As a result, in 1984 Congress enacted section 1325(b); introducing an "ability-to-pay" test.²⁹ The purpose of section 1325(b) was to require debtors to make a substantial effort to repay their creditors.³⁰ Under the statute, a trustee or unsecured creditor could

also Scott Esterbrook, *President Signs Bankruptcy Reform Act*, MONDAQ, June 1, 2005, available at 2005 WLNR 8674451 (mentioning Act will hold debtors more accountable).

²³ Robert J. Landry, III & Nancy Hisey Mardis, Comment, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U.L. REV. 91, 117-19 (2006).

²⁴ *In re Davis*, 348 B.R. 449, 452 (Bankr. E.D. Mich. 2006) ("The purpose of Chapter 13 is described in H.R. Rep. No. 95-595, at 118 (1977) as enabling a debtor to 'develop and perform under a plan for the repayment of his debts over an extended period.'").

²⁵ *Id.* ("Bankruptcy Courts for several years wrestled with whether a short plan . . . should be confirmed with little or no distribution to unsecured creditors even though the debtor had enough future earnings or income that would enable unsecured creditors to receive a substantial distribution if the debtor simply lengthened her plan payments . . .").

²⁶ Robert B. Chapman, *The Bankruptcy of Haig-Simons? The Inequity of Equity and the Definition of Income in Consumer Bankruptcy Cases*, 10 AM. BANKR. INST. L. REV. 765, 783 (2002) (noting that 1984 amendments was in response to rise in bankruptcy filings).

²⁷ See Anne McLaughlin, Note, *Tithing in a Chapter 13 Plan: The Requirement of Reasonableness Under the Religious Liberty and Charitable Donation Protection Act*, 47 B.C. L. REV. 375, 379-382 (2006) (suggesting 1984 version of section 1325(b) was enacted to compensate for substantial consumer abuse).

²⁸ *Davis*, 348 B.R. at 452 (stating courts wrestled with confirming plan that provided zero distribution to unsecured creditors, where extending plan a few years would allow debtors to receive part of their claim). Prior to the 1984 reforms, the Bankruptcy Code did not impose a duty upon the debtor to pay as much as he can afford. Mindy L. Silver, *The Disposable Income Test: An Attempt Toward Uniformity*, 4 BANK. DEV. J. 221, 224 (1987).

²⁹ Bankruptcy and Federal Judgeship Act of 1984, Pub. L. No. 98-353 § 317, 98 Stat. 333, 356 (1984); see McLaughlin, *supra* note 27, at 381 (indicating 1984 amendment established an "ability-to-pay" test).

³⁰ Silver, *supra* note 28, at 225.

object to confirmation of a plan and thus require a debtor to either pay his unsecured claim in full or submit his disposable income for three years into the plan.³¹

As a result, the enactment of section 1325(b), as part of the 1984 amendments,³² was Congress's initial attempt to impose a minimum plan length. Section 1325(b) was designed to provide uniformity³³ and a "test more tailored to the debtor's ability to satisfy claims from future income."³⁴ However, even prior to the recent BAPCPA amendments, courts differed as to the mandatory nature of the minimum plan length.³⁵ A majority of courts pre-BAPCPA required, under section 1325, the completion of a fixed time period in order to receive a discharge.³⁶ Debtors seeking to refinance a house or acquire additional funds were still required to pay off the full amount of their unsecured claims or remain subject to chapter 13 for a full three years.³⁷ Moreover, debtors who through good fortune received a windfall were still subjected to the terms of their plan as confirmed under section 1325(b).³⁸ This is because through the implementation of the "ability-to-pay" test, section 1325(b)

³¹ Prior to BAPCPA section 1325(b)(1) stated:

(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.

11 U.S.C. § 1325(b) (2000) (emphasis added).

³² Bankruptcy and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

³³ McLaughlin, *supra* note 27, at 382 (noting "commentators believed the test would likely bring uniformity"); see Bruce Edward Kosub & Susan K. Thompson, *The Religious Debtor's Conviction to Tithe as the Price of a Chapter 13 Discharge*, 66 TEX. L. REV. 873, 878 (1988) (stating ability to pay test provides clearer standard than bona fide effort test).

³⁴ McLaughlin, *supra* note 27, at 382 (citing *Oversight Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary*, 97th Cong. 19, 32 (1981-1982) (statement of Vern countryman, Vice Chairman, National bankruptcy Conference)).

³⁵ Compare *In re Slusher*, 359 B.R. 290, 303 (Bankr. D. Nev. 2007) (mentioning absent hundred-percent repayment of creditors claims, debtor could not exit chapter 13 in less than 36 months) and *In re McGuire*, 342 B.R. 608, 615 (Bankr. D. Mo. 2006) (stating that pre-BAPCPA claims required three year commitment) and *In re Keller*, 329 B.R. 697, 700-703 (Bankr. D. Cal. 2005) (noting that exiting a plan early deprives trustee of ability to modify plan; debtor either must pay claim in full or seek post-confirmation modification) with *In re Swan*, 368 B.R. 12, 26 (Bankr. D. Cal. 2007) (indicating not all pre-BAPCPA cases required minimum plan length) and *Miller v. Loan Star Mortg., Inc. (In re Miller)*, 325 B.R. 539, 543 (Bankr. D. Pa. 2005) (noting statute does not indicate debtor must remain in plan, if through alternative means can pay off disposable income payments faster than required monthly payments) and *In re Richardson*, 283 B.R. 783, 800 (Bankr. D. Kan. 2002) (asserting statute does not state payment must be paid over 36 months but rather payment must simply be paid).

³⁶ *Slusher*, 359 B.R. at 303.

³⁷ Schanuth, 342 B.R. 601, 606 (Bankr. W.D. Mo. 2006).

³⁸ *Slusher*, 359 B.R. at 303.

was aligned with the fluctuating market (i.e., a debtor, creditor, or trustee can seek to increase or decrease the required plan payments based on the rise and fall of the debtor's income).³⁹ Therefore, a debtor could not terminate a plan early absent special circumstances or payment in full of the unsecured debt.⁴⁰

Judicial interpretation of a debtor's disposable income,⁴¹ however, allowed some courts to take an alternative approach to the section 1325(b) confirmation requirements.⁴² The statute was not only ambiguous as to what was to be included within the definition of disposable income, based on the "reasonably necessary" language, but judges also used the statute to allow debtors to exit a plan early.⁴³ Adopting a monetary view, *In re Richardson*⁴⁴ asserted that because section 1325(b) only called for projected and not a debtor's actual income, that any increases in income were not subjected to a plan.⁴⁵ Additionally, other courts have allowed a debtor to merely pay-off plan payments early despite not paying their claim off in full.⁴⁶

Although courts differed in the application of section 1325(b), the intention of section 1325(b) was to bring greater stability and reform.⁴⁷ Section 1325(b) was enacted only after section 1322(d)'s maximum limit on plan lengths, by itself, failed to balance the needs of creditors and debtors.⁴⁸ To hold that section 1325(b) was

³⁹ McLaughlin, *supra* note 27, at 382 (mentioning commentators supported ability-to-pay test because it was consistent with economic realities of the market place).

⁴⁰ McGuire, 342 B.R. at 615 (holding pre-BAPCPA debtor could not exit plan early absent extraordinary circumstances or payment in full).

⁴¹ Prior to BAPCPA the definition of disposable income was "income which is received by the debtor and which is not reasonably necessary to be expended" 11 U.S.C. § 1325(b)(2) (2000) (as amended under Pub. L. No. 98-353, § 317, 98 Stat. 333, 356 (1984)).

⁴² See *Slusher*, 359 B.R. at 303 (indicating some pre-BAPCPA courts allowed debtor to pay-off plan early while others required minimum duration); *In re Swan*, 368 B.R. 12, 25 (Bankr. D. Cal. 2007) (noting pre-BAPCPA cases existed for both a monetary and temporal view of section 1325).

⁴³ See McLaughlin, *supra* note 27, at 380–83 (mentioning statutory ability to pay test required subjective analysis of "disposable income"); James Rodenberg, *Reasonably Necessary Expenses or Life of Riley?: The Disposable Income Test and a Chapter 13 Debtor's Lifestyle*, 56 MO. L. REV. 617, 664 (1991) (stating no uniformity exists in determining reasonably necessary expenses); *The Ability-to-Pay (Disposable Income) Test*; § 1325(b), 8 COLLIER ON BANKRUPTCY, ¶ 1325.08, at 1325–60 (Resnick & Sommer eds., 15th ed. rev. 2007) (indicating legislative history provided did not give guidance as to meaning of reasonably necessary expenses).

⁴⁴ No. 97-21561-13, 2002 Bankr. LEXIS 1361 (Bankr. D. Kan. October 8, 2002).

⁴⁵ *Id.* at *40–42.

⁴⁶ *In re Kagenveama*, No. 05-28079-PHX-CGC, 2006 Bankr. LEXIS 2759, at *8–9 (Bankr. D. Ariz. July 10, 2006) (noting prior practice allowed for early pay-off without payment in full); *Slusher*, 359 B.R. at 302–03 (indicating some courts allowed debtors with alternative sources of income to pay-off plan without paying unsecured creditors in full); see *Swan*, 368 B.R. at 26 (mentioning pre-BAPCPA cases considering monetary view of section 1325).

⁴⁷ See Silver, *supra* note 28, at 225 (explaining section 1325(b) was intended to create clear standard and eliminate judicial discretion). See generally David S. Kennedy & R. Spencer Clift III, *Reasonable and Necessary Expenses Under Section 1325(b) of the Bankruptcy Code, Post-Confirmation Considerations, and the Effect of Conversion and Dismissal of Chapter 13 Cases*, 32 U. MEM. L. REV. 789, 795 (2002) (noting subjective statutory language of section 1325(b), pre-BAPCPA, allowed for different and conflicting results among courts).

⁴⁸ See Silver, *supra* note 28, at 221 (indicating Congress intended 1325(b) to provide uniform standards when determining amount required to be devoted to plan).

created merely as a multiplicand would be inconsistent not only with congressional intentions but also with the statute's structure, language, and practice.⁴⁹ The purpose of the "ability to pay" test was not to create a guaranteed return but to eliminate the plans where the debtor, despite having the means to pay unsecured creditors, provided the unsecured creditors with little to no recovery of their claims.⁵⁰ Thus, the "ability-to-pay" test allows unsecured creditors or trustees to capture an increase in a debtor's income, for a period of time, as part of the debtor's chapter 13 plan.⁵¹ Accordingly, a fixed plan length not only best effectuates the intention of the 1984 bankruptcy reforms but also of chapter 13's policy to provide an ongoing commitment to repay one's obligations.⁵²

Despite the 1984 reforms to the Bankruptcy Code, the inconsistencies and ambiguities within the amendments did not sufficiently protect creditors from serial filers.⁵³ The BAPCPA reform sought to bring comprehensive improvements to

⁴⁹ *In re Schanuth*, 342 B.R. 601, 606–08 (Bankr. W.D. Mo. 2006) (stating monetary view would be a gross departure from prior practice); *accord In re Davis*, 348 B.R. 449, 455–56 (Bankr. E.D. Mich. 2006) (quoting *In re Schanuth*, 342 B.R. 601, 606–08 (Bankr. W.D. Mo. 2006)); *Slusher*, 359 B.R. at 303 (citing *In re Davis*, 348 B.R. 449, 455–56 (Bankr. E.D. Mich. 2006)); *see, e.g., In re McGuire*, 342 B.R. 608, 615 (Bankr. D. Mo. 2006) (noting Congress did not intend to depart from pre-BAPCPA practice); *see also In re Keller*, 329 B.R. 697, 700 (Bankr. E.D. Cal. 2005) ("It makes little sense to require that a plan specify how it will be funded, and to require regular monthly payments that continue for at least 3 years, then verify that the debtor has the ability to make such payments only to permit the debtor to perform differently than required by the plan.").

⁵⁰ *See Eugene R. Wedoff, Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2005) ("As reflected in the comments of Senator Grassley set out above, means testing has a simple purpose . . . if [debtors] have sufficient debt-paying ability, to make them repay at least some of their debt . . ."). *See generally A. Mechele Dickerson, Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 938 (2006) (explaining judges administering section 707(b) of pre-BAPCPA Code did not "adequately detect fraud and abuse and that they allowed too many debtors with 'means' to avoid repaying their debts under Chapter 7").

⁵¹ *See In re Fitak*, 92 B.R. 243, 249–50 (Bankr. D. Ohio 1988) (mentioning ability to pay test applies to modification proceedings based on an increase in unanticipated earnings); *In re Flaming*, No. 02-03680, 2003 Bankr. LEXIS 2149, at *12 (Bankr. D. Idaho November 10, 2003) (indicating ability to pay test applies to proposed modification of plan to increase payments based on a debtor's unanticipated increase in income (citing *Modification at Request of Trustee or Holder of Unsecured Claim*, 8 COLLIER ON BANKRUPTCY, ¶ 1329.03, at 1329–7 (Resnick & Sommer eds., 15th ed. rev. 2007))). *See generally In re Studer*, 237 B.R. 189, 192 (Bankr. D. Fla. 1998) (stating modifications of debtors' confirmed chapter 13 plan is necessary with increased income).

⁵² A fixed plan achieves uniformity while also providing unsecured creditors with a commitment by the debtor to repay. *See In re Strickland*, No. 06-81060 C-13D, 2007 Bankr. LEXIS 508, at *3 (Bankr. D.N.C. February 13, 2007) (indicating principle goal of chapter 13 is to provide interested parties with an ongoing commitment); Silver, *supra* note 29, at 221 (mentioning goal of 1984 amendments was to achieve uniformity in debtor requirements).

⁵³ BANKRUPTCY OVERHAUL ENACTED—NEW RULES FOR BANKRUPTCY IMPLEMENT, CCH BANKRUPTCY REFORM ACT BRIEFING: BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 1 (April 21, 2005), available at http://www.cch.com/bankruptcy/Bankruptcy_04-21.pdf [hereinafter CCH BRIEFING] (stating BAPCPA reform was in response to escalating filings including an increase in serial filing by same individual).

In a study of seven federal judicial districts during the early 1990s, it was revealed that over 10% of chapter 13 filers had filed four or more cases and over 5% had filed 5 or more cases. These cases demonstrated a debtor's potential to abuse the bankruptcy system. In an extreme case, the study found one debtor filing at least 12 cases. Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor*

correct the potential for debtors to abuse the system.⁵⁴ Notwithstanding BAPCPA's implementation of substantial changes, section 1325(b) was not drastically changed.⁵⁵ The BAPCPA reforms merely improved on the statutory language to ensure that the use of section 1325 reflected the intent of section 1325. Thus, absent a clear intention by Congress,⁵⁶ section 1325(b) should not be read to depart from its prior purpose or from its prior practice under the majority's interpretation.⁵⁷ Section 1325(b) accordingly, must remain a temporal requirement for a debtor seeking confirmation of a plan.

III. CONGRESSIONAL ENACTMENT OF BAPCPA

BAPCPA was introduced to restore the integrity of the bankruptcy system; that is for bankruptcy to be a last resort and not an opportunity for gamesmanship.⁵⁸ Championed as a victory for creditors,⁵⁹ BAPCPA sought to not only prevent fraudulent and abusive claims but also to allow unsecured creditors to collect a larger percentage of debts.⁶⁰ To this end, the focus of the bill was to make filing for

Repayment in Chapter 13, 39 CREIGHTON L. REV. 473, 485 (2006). Additionally, approximately one-in-seven debtors were repeat filers. *Id.* at 499.

⁵⁴ BAPCPA sought to prevent serial filers from abusing the system and walking away from their debts when they have the ability to repay. White House Press Release, *supra* note 2; Press Release, New Democrat Coalition, New Democrats Urge Speaker to Advance Bankruptcy Bill (March 8, 2005), available at http://www.house.gov/apps/list/press/ca10_tauscher/030805_bankruptcy.html [hereinafter New Democrat Coalition Press Release]; see Dickerson, *supra* note 50, at 938–39 (explaining elimination of "opportunistic Abusive Debtor" as policy justifications for BAPCPA).

⁵⁵ See *infra* Section III.A (discussing statutory changes to 1325(b)). Compare 11 U.S.C. § 1325(b)(1)(B) (2000) with 11 U.S.C. § 1325(b)(1)(B) (2006).

⁵⁶ Although the legislative history is sparse, it is clear that Congress intended section 1325(b) to remain a temporal requirement. See *infra* Section III.B.

⁵⁷ See *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (stating subsequent reforms will not erode past practices absent congressional indication); *In re Schanuth*, 342 B.R. 601, 608 (Bankr. W.D. Mo. 2006) (holding absent congressional instructions court must consider section 1325(b) as temporal time requirement).

While many courts not only considered section 1325(b) as a minimum plan length, approximately 60% of chapter 13 plans proposed were sixty months. Norberg, *supra* note 53, at 526–27. This statistic indicates that prior to the implementation of the "applicable commitment period," debtors were proposing a plan length equal to what the applicable commitment period now requires for above the median income debtors.

⁵⁸ White House Press Release, *supra* note 2 ("Yet bankruptcy should always be a last resort in our legal system."); Henry E. Hilderbrand, III, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees*, 79 AM. BANKR. L.J. 373, 373 n.3 (2005) (quoting H.R. Rep. 109-31, at p.2 (2005)); CCH BRIEFING, *supra* note 53 ("The intent of Congress was to improve bankruptcy law and practice with a dominant theme of restoring personal responsibility and integrity in the bankruptcy system.").

⁵⁹ Kathleen Day, *Bankruptcy Bill Passes; Bush Expected to Sign*, WASHINGTON POST, April 15, 2005, at E1, available at <http://www.washingtonpost.com/wp-dyn/articles/A53688-2005Apr14.html>; see George H. Singer, *The Year in Review: Case Law Developments Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 82 N. DAK. L. REV. 297, 304 (2006) (stating BAPCPA was designed to strength and advance the interests of creditors).

⁶⁰ William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, 164 (2007) (indicating goal of creditors during reform process was to increase their return). See generally Alane A. Becket & William A. McNeal, *Projected Disposable Income in Chapter 13: A Menu of*

bankruptcy more difficult and to force more debtors to utilize chapter 13 instead of chapter 7.⁶¹ Congress's modification of the Bankruptcy Code, while toughening the requirements for debtors to file, balanced this goal with the traditional goal of providing a "fresh start" to those who need debt relief.⁶² The revision of section 1325(b) to include the term "applicable commitment period," reflects this delicate balance.⁶³ The applicable commitment period represents a two-tiered minimum plan length where the minimum commitment for a below median income debtor is three years and for an above the median income debtor is five years.⁶⁴ Consequently, the congressional record and statutory text reveal that when creating a distinction between a debtor's income level, Congress did not intend to deviate from the temporal notion of section 1325(b).⁶⁵

Fact, Fiction and Forms, 26 AM. BANKR. L.J. 20, 20 (2007) (noting BAPCPA's new and detailed formula for assessing debtor's ability to pay unsecured creditors).

⁶¹ See John C. Anderson, *Highlights of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 – Part 1 – Consumer Cases*, 33 S.U. L. REV. 1, 2 (2005) (suggesting main purpose of BAPCPA was to direct greater number of bankruptcy filers into chapter 13); Hildebrand, *supra* note 18, at 14 (indicating that express goal of reform was to compel debtors into chapter 13); see also *Neary v. Ross-Tousey (In re Ross-Tousey)*, 368 B.R. 762, 763 (E.D. Wis. 2007) (noting key objective of BAPCPA was to direct debtors able to repay unsecured creditors towards chapter 13 and prevent abuse of chapter 7 relief).

⁶² See *In re Kidd*, No. 06-41232, 2007 Bankr. LEXIS 2812, at *7–8 n.6 (Bankr. D. Kan. August 27, 2007) (citing comments in congressional record indicating purpose of chapter 13 bankruptcy is to compel debtors to repay portion of their debt during set time period in exchange for eventual discharge of debt and "fresh start"); New Democrat Coalition Press Release, *supra* note 54 (stating BAPCPA finds an equitable balance between preventing abuse and providing debtor relief); see also *In re Grady*, 343 B.R. 747, 751 (Bankr. N.D. Ga. 2006) (indicating principal tenet of Bankruptcy Code is to provide relief for honest debtor (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244–45 (1934))); Tedra Hobson, Note, *The Bankruptcy Abuse Creation Act?: Curing Unintended Consequences of Bankruptcy Reform*, 40 GA. L. REV. 1245, 1246 (2006) (noting while reform was largely creditor focused, Congress included some consumer-friendly provisions).

⁶³ See *In re Briscoe*, No. 06-00458, 2007 Bankr. LEXIS 2943, at *34–37 (Bankr. D.D.C. September 4, 2007) (construing recent changes to Code and determining that prior bankruptcy court practice of evaluating debtors' chapter 13 plans are harmonious with changes to section 1325(b)); *In re Grant*, 364 B.R. 656, 661–63 (Bankr. D. Tenn. 2007) (asserting applicable commitment period applies only upon objection to proposed plan); *In re Slusher*, 359 B.R. 290, 302–03 (Bankr. D. Nev. 2007) (drawing on pre-BAPCA approach to show changes to section 1325(b) preserve principle of requiring debtors to repay creditors for a specific period of time).

⁶⁴ 11 U.S.C. § 1325(b)(4) (2006); see *In re Schanuth*, 342 B.R. 601, 606 (Bankr. W.D. Mo. 2006) ("BAPCPA's only apparent change to minimum plan length is the creation of a two-tiered system based on a debtor's income[.]"); see also *In re Zirtzman*, No. 06-00015, 2006 Bankr. LEXIS 2721, at *4–5, 10 (Bankr. N.D. Iowa October 4, 2006) (holding plain language of Code prevented court from confirming debtors' chapter 13 plan that did not provide for payments to unsecured creditors for five years where debtors' income was above applicable median income); *In re Girodes*, 350 B.R. 31, 35 (Bankr. M.D.N.C. 2006) (finding that section 1325(b)(4) fixes minimum time frame of three or five years for debtor to remain in chapter 13 bankruptcy, unless debtor pays creditors in full over shorter period).

⁶⁵ See *Schanuth*, 342 B.R. at 608 (stressing abandonment of temporal framework for determining plan duration would be unjustified due to absence of any indication of congressional endorsement for such change). See generally *In re Alexander*, 344 B.R. 742, 751 (Bankr. E.D.N.C. 2006) (finding instructive examples, in other sections, of efforts made by Congress to distinguish between monetary and temporal requirements); *In re McGuire*, 342 B.R. 608, 615 (Bankr. W.D. Mo. 2006) (finding temporal interpretation of applicable commitment period is most logical based on plain reading of text and consideration of entire Code).

A. Statutory Construction

The starting point for interpreting any statute is the assumption that Congress acted carefully and specifically when drafting a provision.⁶⁶ A court's chief function therefore is to carry-out the specific language of a statute and to avoid rendering words as merely surplusage.⁶⁷ Thus, "[w]here the language is clear on its face, the court's inquiry should normally end."⁶⁸ In determining the meaning of each word chosen, a court should not only look to the general usage of the word but also to the use of the term throughout the rest of the Bankruptcy Code.⁶⁹ As a whole, the words of a statute should be read to avoid an absurd result.⁷⁰ The plain meaning of section 1325(b) has been subject to great dispute, with both sides claiming that on its face the statute supports their position.⁷¹ Contextually, although the language is not clear, the wording of section 1325(b) and the rest of the Bankruptcy Code generally favors a temporal reading of the applicable commitment period.

⁶⁶ Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (reaffirming that courts must presume language in statute articulates legislative intent); BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994) ("Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another."); *Slusher*, 359 B.R. at 295 (highlighting presumption that plain meaning of statute is intended and accepted interpretation by Congress).

⁶⁷ See *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("[W]here . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))); *Slusher*, 359 B.R. at 295 (indicating presumption to apply plain meaning of statute); *Schanuth*, 342 B.R. at 607 (finding plain language of statute controlled court's construction of legislation); *Hot Topics and Issues After October 17*, American Bankruptcy Institute, 13th Annual Northeast Bankruptcy Conference and Northeast Consumer Forum (July 13–16, 2006), available at Westlaw 060713 ABI-CLE 709 [hereinafter *Hot Topics and Issues*] (noting that courts should respect words of Congress).

⁶⁸ *In re Fuger*, 347 B.R. 94, 96 (Bankr. D. Utah 2006). See *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (refusing to expand scope of statute by reading into it absent or omitted words); *Miller v. United States*, 363 F.3d 999, 1008 (9th Cir. 2004) (reiterating court's objective is to give meaning to every word of legislative enactment when construing statute).

⁶⁹ See *In re Sawdy*, 362 B.R. 898, 904 (Bankr. E.D. Wis. 2007) (stating that words rarely exist in vacuum); *Slusher*, 359 B.R. at 295 (noting it is appropriate to consider how Bankruptcy Code uses same or similar words). See generally *In re Purdy*, No. 06-30679-LMK, 2007 Bankr. LEXIS 2598, at *11 (Bankr. N.D. Fla. August 6, 2007) (mentioning when interpreting meaning of statute it maybe necessary to consider impact of ruling).

⁷⁰ See *In re Kibbe*, 361 B.R. 302, 313 (B.A.P. 1st Cir. 2007) (indicating if statute is ambiguous, courts should be careful to avoid ruling that would render an absurd result); *In re Kolb*, 366 B.R. 802, 807 (Bankr. S.D. Ohio 2007) (noting courts are not bound to plain language of statute where most faithful interpretation would lead to absurd results); *In re Wiggs*, No. 06-B-70203, 2006 Bankr. LEXIS 1547, at *6 (Bankr. N.D. Ill. August 4, 2006) ("[S]tatutory construction requires interpreting the language of a statute to avoid absurd results." (citing *FutureSource LLC v. Reuters, Ltd.*, 312 F.3d 281, 284–85 (7th Cir. 2002))).

⁷¹ See *Hot Topics and Issues*, *supra* note 67 (discussing dispute over plain meaning of section 1325); *Becket & Lee*, *supra* note 6, at 44–45 (noting plain meaning doctrine can support temporal or monetary reading of section 1325(b)).

1. The Language of the Term "Applicable Commitment Period"

Parsing each of the words within the phrase "applicable commitment period" reveals a term with a distinct temporal connotation. The word "period," by itself, connotes a chronological division of time or a length of existence.⁷² Therefore, the term "period" represents a time period rather than a monetary amount.⁷³ Additionally, during the BAPCPA revisions, the term "period" was left in tact, but the term "three-years" was replaced with "applicable commitment."⁷⁴ Given the widely accepted meaning of 1325(b) pre-BAPCPA as a fixed plan length, a court should not deviate from the prior interpretation of the word "period."⁷⁵ The use of the word "period" throughout the rest of the Bankruptcy Code suggests Congress used the term as a temporal measurement.⁷⁶ For example, section 505, as modified by BAPCPA, added the term "applicable period" to specify that the court cannot adjust ad valorem taxes after the appropriate portion of time to contest the amount of taxes has expired.⁷⁷ Additionally, section 1322 states a "plan may not provide for

⁷² See Merriam-Webster Online Dictionary, Definition of Period, <http://mw1.merriam-webster.com/dictionary/period> (last visited Sept. 8, 2007); see also *In re Davis*, 348 B.R. 449, 456 (Bankr. E.D. Mich. 2006) (relying on everyday meaning of word "period" to suggest section 1325(b) requires action over period of time); *In re Alexander*, 344 B.R. 742, 750 (Bankr. E.D.N.C. 2006) (finding word "period" in term applicable commitment period "denotes a portion of time"); *Schanuth*, 342 B.R. at 607 (Bankr. W.D. Mo. 2006) (noting word "period" has temporal connotation).

⁷³ *In re Hylton*, No. 07-70320, 2007 Bankr. LEXIS 3023, at *20–21 (Bankr. W.D. Va. August 22, 2007) (finding support for temporal interpretation of applicable commitment period in both plain language of section 1325(b) and temporal references that permeate Bankruptcy Code); *In re Girodes*, 350 B.R. 31, 35 (Bankr. M.D.N.C. 2006) ("The use of the term 'period' implies time period rather than amount."); see also *Schanuth*, 342 B.R. at 607 (finding that applicable commitment period clearly requires an obligation for specific time period).

⁷⁴ Compare 11 U.S.C. § 1325(b)(1) (2000) with 11 U.S.C. § 1325(b)(1) (2006); see *In re Kagenveama*, No. 05-28079-PHX-CGC, 2006 Bankr. LEXIS 2759, at *8 (Bankr. D. Ariz. July 10, 2006) ("['A]pplicable commitment' replaced the words 'three year' before the word 'period.'"); see also *In re Austin*, No. 07-10031, 2007 Bankr. LEXIS 2584, at *12 (Bankr. D. Vt. August 7, 2007) ("BAPCA did not change [section 1325(b)(1)], except to insert 'applicable commitment period' in lieu of 'three year period.'").

⁷⁵ See *Kagenveama*, 2006 Bankr. LEXIS 2759, at *8 (finding no justification for departure from historical temporal understanding of debtor's obligation under chapter 13 plan); *In re Nance*, 371 B.R. 358, 370 (Bankr. S.D. Ill. 2007) (remarking temporal construction of requirements for chapter 13 plan is consistent with pre-BAPCPA approach). See generally *In re Grant*, 364 B.R. 656, 662–63 (Bankr. E.D. Tenn. 2007) (noting majority of courts having construed language in section 1325(b) found applicable commitment period constitutes temporal measurement).

⁷⁶ See 11 U.S.C. § 366(c)(2) (2006) (using term "period" as part of term for 30-day interval of time); 11 U.S.C. § 507(a)(8)(G) (stating "applicable time period" can be suspended for any length of time in which government is prohibited from collecting taxes); 11 U.S.C. § 1308 (2006) (supplying word "period" to signify division of time for which taxes are computed). Additionally, under 11 U.S.C. § 521(i) the court may decline to dismiss a case if the debtor in good faith attempted to file the required information before the "expiration of the applicable period." 11 U.S.C. § 521(i); see *Dismissal for Failure to File Required Information*, 4 COLLIER ON BANKRUPTCY, ¶ 521.24, at 521–84 (Resnick & Sommer eds., 15th ed. rev. 2007).

⁷⁷ 11 U.S.C. § 505(a)(2)(C) ("[T]he amount or legality of any amount arising in connection with an ad valorem tax on real or personal property of the estate, if the applicable period for contesting or redetermining that amount under any law (other than a bankruptcy law) has expired.") (emphasis added); see *Delafield 246 Corp. v. City of New York (In re Delafield 246 Corp.)*, No. 05-13634 (ALG), 2007 Bankr.

payments over a period that is longer than 5 years."⁷⁸ The use of the word "period" within section 1322 demonstrates an interval of time.⁷⁹ Therefore the term "period" within the statute suggests section 1325(b) must be utilized as a time length.

Moreover, through using the word "commitment" Congress explicitly provides that a debtor must pledge to perform a specific act.⁸⁰ Adding this word, within section 1325, typifies BAPCPA's express purpose of providing the unsecured creditor with an ongoing obligation from debtors to repay.⁸¹ The use of the word "commitment" throughout the Bankruptcy Code infers that the term stands for an individual's responsibility or duty to complete a task.⁸² For example, under section 523(a)(12) the word "commitment" is synonymous with the word "obligation," when stating a discharge does not eliminate a debtor's commitment to a "Federal depository institutions regulatory agency."⁸³ Together, the words "commitment" and "period" indicates a debtor has the responsibility to perform some action over a period of time.⁸⁴

Finally, the word "applicable" refers to something's capability of being applied for a particular purpose.⁸⁵ As an adjective, the word "applicable" is used throughout

LEXIS 1389, *26 n.7 (Bankr. S.D.N.Y. April 25, 2007) (explaining after statute of limitations expired, time for contesting taxes had expired and thus applicable commitment had ended).

⁷⁸ 11 U.S.C. § 1322(d)(1)(C).

⁷⁹ *In re Slusher*, 359 B.R. 290, 302 n.22 (Bankr. D. Nev. 2007) (observing that section 1322 uses word "period" to describe maximum length of chapter 13 plan); see *In re Girodes*, 350 B.R. 31, 35 (Bankr. M.D.N.C. 2006) (examining use of word "period" throughout section 1322 to show lucidity of temporal interpretation); *In re Dew*, 344 B.R. 655, 661 (Bankr. N.D. Ala. 2006) ("It is impossible to read sections 1322(d)(2), 1325(b)(4)(A) and 1329(c) and conclude the Bankruptcy code contemplates something other than a defined length of time for payments to be made under a Chapter 13 plan, i.e. the applicable commitment period.").

⁸⁰ See Merriam-Webster Online Dictionary, Definition of Commitment, <http://mw1.merriam-webster.com/dictionary/commitment> (last visited Sept. 8, 2007); see also *In re Davis*, 348 B.R. 449, 456 (noting use of word "commitment" suggest obligation to perform an act); *Slusher*, 359 B.R. at 301 (defining "commitment" as agreeing to carry-out specific course of action).

⁸¹ *Slusher*, 359 B.R. at 304 (using word "commitment" is consistent with congressional goal to provide interested parties with an ongoing obligation by debtor to submit income and expenses for review).

⁸² See 11 U.S.C. § 365(o) ("This subsection shall not extend any commitment that would otherwise be terminated"); 11 U.S.C. § 507(a)(9) (stating claims based on "commitment" by debtor to Federal depository institutions regulatory agency shall have ninth priority).

⁸³ See 11 U.S.C. § 523(a)(12) (noting discharge does not discharge a debtor's liability "for malicious or reckless failure to fulfill any *commitment* by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution" (emphasis added)); see also *In re Chavez*, 140 B.R. 413, 419 (Bankr. W.D. Tex. 1992) ("[E]xcepting debts incurred for malicious or reckless failure to fulfill any obligation to a federal depository institution [from discharge]").

⁸⁴ See *Davis*, 348 B.R. at 456 (finding that use of "period" and "commitment" together suggest "an obligation to do something over a period of time"); see also *In re Luton*, 363 B.R. 96, 99 (Bankr. W.D. Ark. 2007) (noting majority of courts require debtor to propose plan payments for length of applicable commitment period); *Slusher*, 359 B.R. at 301-02 ("[A]pplicable commitment period' thus stands for the appropriate length of time during which the debtor has agreed to make payments.").

⁸⁵ See Merriam-Webster Online Dictionary, Definition of Applicable, <http://mw1.merriam-webster.com/dictionary/applicable> (last visited Sept. 8, 2007); *Slusher*, 359 B.R. at 301 (citing to dictionaries to define term "applicable" as meaning "fit or suitable for its purpose; appropriate"); see also *In re Wiggs*, No. 06-B-70203, 2006 Bankr. LEXIS 1547, at *6 (Bankr. N.D. Ill. August 4, 2006) (finding term "applicable" is tool which limits amounts to only specific purpose it applies to).

the Bankruptcy Code as a modifier, expressing when a particular action or phrase should be utilized.⁸⁶ For example, the use of the word "applicable" in section 707(b)(2) is used to limit which of the debtor's expenses is subjected to the statute's regulations.⁸⁷ As such, the word "applicable" found within section 1325(b) modifies the "commitment period." Therefore, the use of word "applicable" is to indicate that there are multiple commitment periods and a plan must apply only the correct one (i.e., either a three or five year commitment period as required under section 1325(b)(4)).

As a result, the applicable commitment period as a term stands for the proposition that a debtor must bind himself to a plan for a fix number of years.⁸⁸ If Congress intended the applicable commitment period to be used purely as a multiplicand, it would have expressly provided more direct language to signify its intent.⁸⁹ This idea is demonstrated throughout the Bankruptcy Code's other provisions which deliberately used the word "multiply" or "multiplied."⁹⁰ For example, when Congress wanted a debtor's income to be multiplied by a factor of sixty months, as part of the means test, it specifically stated the "current monthly income [is to be] . . . multiplied by 60[.]"⁹¹ Even within section 1325(b), where

⁸⁶ See *Wiggs*, 2006 Bankr. LEXIS 1547, at *6 ("[T]he term 'applicable' modifies the amounts specified to limit the expenses to only those that apply."); *Slusher*, 359 B.R. at 308–09 (noting term "applicable" is a modifier); see also *Consumer Workshop III: Divorce, Exemptions, Taxes and More*, American Bankruptcy Institute, 12th Annual Rocky Mountain Bankruptcy Conference (January 25–27, 2007), available at Westlaw 070125 ABI-CLE 45 [hereinafter *Consumer Workshop III*] (indicating word "applicable" in section 707(b) serves as modifier).

⁸⁷ See *Consumer Workshop III*, *supra* note 86 (indicating word "applicable" is used to specify which expenses apply); *Wiggs*, 2006 Bankr. LEXIS 1547, at *7 (suggesting if word "applicable" does not limit which expenses apply, then term "applicable" would be superfluous).

⁸⁸ *Slusher*, 359 B.R. at 301 ("[A]pplicable commitment period' thus stands for the appropriate length of time during which the debtor has agreed to make payments.").

⁸⁹ *Davis*, 348 B.R. at 456–57 (finding if Congress intended for section 1325(b)(1)(B) to be interpreted as multiplicand, then it would have said so, as it has done in other sections of BAPCPA); see *In re Schanuth*, 342 B.R. 601, 607 (Bankr. W.D. Mo. 2006) ("If Congress had intended for ACP to function as a multiplier, Congress surely could have described it as such . . ."); see also *In re Alexander*, 344 B.R. 742, 751 (Bankr. E.D. N.C. 2006) ("If Congress wanted the applicable commitment period to function as a multiplier, it could have stated so in the statute.").

If Congress wanted the applicable commitment period to be a multiplicand, section 1325(b)(1)(B) could have stated (the author's changes to the statute are indicated in italics):

(B) the plan provides that all of the debtor's projected disposable income *when multiplied by the applicable commitment period is to be received* beginning on the date that the first *installment* is due under the plan *and* will be applied to make payments to unsecured creditors under the plan.

⁹⁰ See 11 U.S.C. § 707(b)(2)(A)(i) (2006) ("[T]he court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 . . ."); 11 U.S.C. § 1322(d)(1) ("If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12 . . ."); 11 U.S.C. § 1326(b)(3)(B)(ii) ("[T]he amount payable to unsecured nonpriority creditors, as provided by the plan, multiplied by 5 percent, and the result divided by the number of months in the plan."); 11 U.S.C. § 704(b)(2) ("[T]he product of the debtor's current monthly income, multiplied by 12 is not less than . . .").

⁹¹ 11 U.S.C. § 707(b)(2)(A)(i).

Congress wanted individuals to multiply terms, it intentionally included such language. For instance, section 1325(b) states the applicable commitment period is five years "if the current monthly income . . . when *multiplied* by 12, is not less than . . . the median family income[.]"⁹² However, neither these provisions nor any other subsection of 1325(b) makes any indication that a plan should multiply a debtor's disposable income by either a three or a five year applicable commitment period.⁹³ The use of the multiplier language therefore, in one section but not in others suggests Congress specifically excluded such interpretation and intended the applicable commitment period to be a portion of time.⁹⁴

2. The Language of Section 1325(b) as a Whole

Critical to understanding the meaning of the term "applicable commitment period" is to contextualize the phrase within its given section.⁹⁵ Arguably, the language of 1325(b) can portray either a temporal or a monetary definition. Three critical phrases that demonstrate the conflicting nature of section 1325(b) are "but only if" in section 1325(b)(4)(B), "to be received in" under section 1325(b)(1)(B), and finally "projected disposable income" under section 1325(b)(1)(B).

Section 1325(b)(4)(B) was added as part of the BAPCPA reforms and provides an opt-out clause for when a plan may be shorter than the applicable commitment period.⁹⁶ The language states that the applicable commitment period "may be less than 3 or 5 years, whichever is applicable . . . *but only if* the plan provides for payment in full of all allowed unsecured claims over a shorter period."⁹⁷ The emphasis on the words "only if" suggest that the applicable commitment period is a fixed time length that cannot be shortened absent a plan providing an unsecured

⁹² 11 U.S.C. § 1325(b)(4) (emphasis added).

⁹³ See *In re Casey*, 356 B.R. 519, 527 (Bankr. E.D. Wash. 2006) ("Subpart (b)(4) makes no reference to any monetary analysis to be used in determining the length of the plan, but refers to a measurement of time."). See generally *Schanuth*, 342 B.R. at 607 (rejecting monetary interpretation of section 1325(b) based on plan meaning of statute).

⁹⁴ See *Hot Topics and Issues*, *supra* note 67 (stating Congress acts intentionally when it includes language in one section but omits it in another); see also *In re Slusher*, 359 B.R. 290, 302 (Bankr. D. Nev. 2007) ("Congress says what it means and means what it says—if it wants to use a multiplicand, it will say so, usually with the words 'multiplied by.'"); *Davis*, 348 B.R. at 456–57 (noting if Congress wanted to use multiplicand Congress would have specifically included language to reflect this desire, as it has done in other sections).

⁹⁵ See *Slusher*, 359 B.R. at 301–02 (looking to language in other sections to determine how Congress uses words to reflect either temporal or multiplier concept); see also *In re Girodes*, 350 B.R. 31, 35 (Bankr. M.D. N.C. 2006) (justifying term "period" refers to portion of time by finding temporal references throughout Bankruptcy Code); *Coleman v. Cmty. Trust Bank (In re Coleman)*, 426 F.3d 719, 725 (4th Cir. 2005) ("Our determination of whether a statute is ambiguous is guided 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'").

⁹⁶ See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 318, 119 Stat. 23, 93–94 (2005).

⁹⁷ 11 U.S.C. § 1325(b)(4)(B) (emphasis added).

creditor with full repayment of the debt.⁹⁸ As such, section 1325(b)(4)(B) exists as an exception to the rule, providing debtors with the ability to opt out of a prolonged bankruptcy period.⁹⁹ Debtors choosing to opt out from the statutorily mandated time length, however, are still subjected to a temporal plan length; it is just a "shorter period" of time.¹⁰⁰ If the applicable commitment period was a multiplier, this section would be awkward or meaningless.¹⁰¹ Under a monetary view, this section is only stating that a debtor does not have to pay the minimum statutory amount, if multiplying a debtor's disposable income by a smaller number results in the debtor paying his allowed unsecured claims in full.¹⁰² This section, therefore, only provides that a debtor does not have to pay any more than what he owes to his unsecured creditors.¹⁰³ Under a temporal view, however, the section incorporates both a time and money aspect; providing that a specified monetary amount changes the required plan length.¹⁰⁴ Although under both views the outcome would be the same (i.e., the debtor does not have to remain in bankruptcy after paying off in full his allowed unsecured claims), a temporal interpretation gives meaning to the plain language of the statute.¹⁰⁵

⁹⁸ *Davis*, 348 B.R. at 453 (indicating plan length may only be shorter than required length if debtor proposes to pay all unsecured claims in full over shorter period); *Schanuth*, 342 B.R. at 607 (finding section 1325(b)(4)(B) requires fixed plan length that can only be shortened if specific condition is met); *In re Alexander*, 344 B.R. 742, 750–51 (Bankr. E.D.N.C. 2006) ("[T]he statute clearly states that the only way to shorten an applicable commitment period of 3 or 5 years is 'if the plan provides for payment in full of all allowed unsecured claims over a shorter period.'").

⁹⁹ *Casey*, 356 B.R. at 526 (finding that section 1325(b)(4)(B) establishes exception to required plan length); *In re Mullen*, 369 B.R. 25, 29 (Bankr. D. Or. 2007) (stating Bankruptcy Code expressly states when plan can be shorter than applicable commitment period); see Becket & Lee, *supra* note 6, at 16 (noting applicable commitment period may only be shortened if unsecured creditors are paid in full); Eugene R. Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA*, 2007 U. ILL. L. REV. 31, 61 (2007) [hereinafter *Major Consumer Bankruptcy Effects of BAPCPA*] ("[R]equiring that, in the absence of earlier full payment of all claims, the 'applicable commitment period' is five years [for an above the median debtor].").

¹⁰⁰ See 11 U.S.C. § 1325(b)(4)(B) ("[M]ay be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period." (emphasis added)); see also *Slusher*, 359 B.R. at 303 (noting Congress would not have included section 1325(b)(4)(B) if applicable commitment period only required fixed monetary return).

¹⁰¹ *Schanuth*, 342 B.R. at 607 ("[A] monetary interpretation of ACP renders § 1325(b)(4)(B) awkward, if not meaningless."); see *In re McGuire*, 342 B.R. 608, 615 (Bankr. W.D. Mo. 2006) (agreeing with *Schanuth* that monetary interpretation of applicable commitment period makes section 1325(b)(4)(B) meaningless); *In re Nevitt*, No. 05–77798, 2006 Bankr. LEXIS 1763, at *11–12 (Bankr. N.D. Ill. August 18, 2006) (citing *McGuire* for proposition that "monetary interpretation would render § 1325(b)(4)(B) meaningless").

¹⁰² *Schanuth*, 342 B.R. at 608 ("A monetary interpretation of ACP renders § 1325(b)(4)(B) more tautological than substantive – i.e., the amount a debtor has to pay under a chapter 13 plan cannot exceed the amount a debtor may pay under a chapter 13 plan.").

¹⁰³ *Id.* at 607–08; accord *Davis*, 348 B.R. at 455 (citing *Schanuth*, 342 B.R. at 607).

¹⁰⁴ *Schanuth*, 342 B.R. at 608 (noting a temporal interpretation of section 1325(b)(4)(B) is more logical because it conveys more meaningful requirement by integrating a time and money concept); *Davis*, 348 B.R. at 454 (agreeing with Courts analysis in *Schanuth*).

¹⁰⁵ *Schanuth*, 342 B.R. at 607–08 (calling outcome "not altogether different" but temporal result is more logical); see *In re Mullen*, 369 B.R. 25, 29 (Bankr. D. Or. 2007) (agreeing with courts that temporal interpretations of applicable commitment period based on plain meaning is accepted interpretation); *Slusher*, 359 B.R. at 301 (using plain meaning to interpret "applicable commitment period" as temporal concept).

Linguistically, however, one of the strongest arguments for a monetary interpretation arises from section 1325(b)(1)(B). Under this section, a "debtor's projected disposable income [is] *to be received in* the applicable commitment period[.]"¹⁰⁶ Giving substantial weight to the words "to be received in" suggests the applicable commitment period is only a period of time from which the minimum payment must be computed and not a mandatory plan length.¹⁰⁷ The applicable commitment period, therefore, is only used as a multiplicand to determine the minimum amount due.¹⁰⁸ Accordingly, a debtor can exit a chapter 13 plan early, if the debtor, through good fortune, has additional assets to pay-off his projected disposable income faster than the required payments over the applicable commitment period.¹⁰⁹

In context, however, this provision requires the debtor to submit all his "projected disposable income." If "projected disposable income" is different from "disposable income," as defined under section 1325(b)(2), projected disposable income would be a forward looking concept.¹¹⁰ Currently, a majority of the courts

¹⁰⁶ 11 U.S.C. § 1325(b)(1)(B) (2006) (emphasis added).

¹⁰⁷ See *Slusher*, 359 B.R. at 301 (noting debtor argues, using "to be received in" language, that debtor is only required to pay amount equal to what debtor would have received during applicable commitment period and is not required to remain in bankruptcy for fixed period of time); *In re Fuger*, 347 B.R. 94, 101 (Bankr. D. Utah 2006) (holding applicable commitment period does not "bind debtors to a specific period of time"); KEITH M. LUNDIN, 6 CHAPTER 13 BANKRUPTCY § 500.1, at 500-2 (3d ed., Bankruptcy Press 2000 & Supp. 2006) (suggesting applicable commitment period is a multiplicand to determine amount that must be paid to unsecured creditors and not fixed time length).

¹⁰⁸ See *In re Brady*, 361 B.R. 765, 776-78 (Bankr. D.N.J. 2007) (citing LUNDIN, *supra* note 107, for proposition that applicable commitment period is multiplicand).

¹⁰⁹ *Fuger*, 347 B.R. at 98-101 (examining congressional intent and holding once debtor pays specified return, debtor is not required to remain in bankruptcy for fixed time period).

¹¹⁰ *In re Purdy*, No. 06-30679-LMK, 2007 Bankr. LEXIS 2598, at *6-23 (Bankr. N.D. Fla. August 6, 2007) (weighing competing interpretations and finding "projected" modifies "disposable income" and term is forward looking); *Mullen*, 369 B.R. at 32 ("Adding 'projected' to the phrase [disposable income] transforms it to a forward-looking concept."); *A Year After BAPCPA*, *supra* note 20, at 2, 8, 16, 19 (arguing for forward-looking approach to projected disposable income).

Among courts, a substantial conflict exists as to whether "projected disposable income" is synonymous with "disposable income." See *In re Daniel*, 359 B.R. 320, 323, 325-26 (Bankr. D. Kan. 2006); *In re Fuller*, 346 B.R. 472, 477-82 (Bankr. S.D. Ill. 2006); *Major Consumer Bankruptcy Effects of BAPCPA*, *supra* note 99, at 61 ("The ambiguity created by applying the word 'projected' to the retrospective concept of 'current monthly income' has produced a range of judicial interpretations."). Those that hold projected disposable income is a forward looking concept assert that the word "projected" must be given independent significance. *Fuller*, 346 B.R. at 482; *In re Jass*, 340 B.R. 411, 415-16 (Bankr. D. Utah 2006); see *Consumer Workshop III*, *supra* note 86. Additionally, if Congress wanted both terms to mean the same thing, they would have said so or not added the word "projected" in section 1325(b)(1)(B). *Jass*, 346 B.R. at 415-16; *Singer*, *supra* note 59, at 374 n.402. Others, however, assert that debtors must calculate their disposable income as defined under section 1325(b)(2) and then use that amount to project future earnings. *In re Nance*, 371 B.R. 358, 365 (Bankr. D. Ill. 2007). Under this view, projected disposable income is only backward looking and does not examine future earning potential. See *Hilderbrand*, *supra* note 58, at 388-89.

If the definition of "projected disposable income" is found to be synonymous with "disposable income," section 1325(b)(1)(B) would support a monetary interpretation of the applicable commitment period. This is because there would be no reference to a forward looking concept, leaving the section to

hold that "projected disposable income" and "disposable income" are two distinct terms.¹¹¹ Consequently, the term implies an ongoing ability to reevaluate a debtor's income potential.¹¹² Arguably, while a projection is synonymous with a prediction, the term "projected disposable income" does not establish a fixed monetary amount based on a debtor's predicted ability to repay.¹¹³ This is because, the words "to be received" linguistically invokes a future period of time, suggestive of Congress's desire to obtain what a debtor actually earns in the future.¹¹⁴ As a result, the phrase "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period[,]"¹¹⁵ is used merely to capture all increases in disposable income over a period of time. The phrase, therefore, is not used to insinuate that section 1325(b) only requires a fixed minimum payment to be received in the applicable commitment period. Nevertheless, given the inconsistencies within section 1325(b), between section 1325(b)(4)(B) and section 1325(b)(1)(B), it is not clear from the text itself whether the language supports a temporal or monetary interpretation.

3. Applicable Commitment Period as it Relates to Other Bankruptcy Code Provisions

Where the plain language of a statute may be insufficient, by itself, to determine Congress's intent for a specific provision, contextualizing the provision as it relates to other sections of the Bankruptcy Code can shed light on the true meaning of the statute.¹¹⁶ Although the term "applicable commitment period" is not widely used

require that a fixed amount, as defined by a debtor's current monthly income, must be paid within a set time frame (the applicable commitment period).

¹¹¹ See *Grant v. Mosher (In re Grant)*, 364 B.R. 656, 664 (Bankr. D. Tenn. 2007) (stating that "majority view" is that projected disposable income and disposable income are not synonymous); *In re Riggs*, 359 B.R. 649, 652 (Bankr. D. Ky. 2007) ("[T]he majority of courts . . . have focused on the distinction between 'projected disposable income' and 'disposable income.'"); Becket & McNeal, *supra* note 60, at 20–21, 65 (collecting cases noting distinction between terms).

¹¹² *Purdy*, 2007 Bankr. LEXIS 2598, at *7–8 (suggesting forward-looking view of projected disposable income implies ability to reexamine debtor's income over life of plan); see *In re LaPlana*, 363 B.R. 259, 265–66 (Bankr. M.D. Fla. 2007) (holding that courts must be responsive to changes in circumstance); *Fuller*, 346 B.R. at 483 ("[I]t makes little sense to freeze the calculation of the debtor's income at a particular—possibly arbitrary—point in time and set the number in stone.").

¹¹³ See generally *Purdy*, 2007 Bankr. LEXIS 2598, at *6–7 (determining most courts hold "project disposable income" is forward-looking concept); *In re Grant*, 364 B.R. at 664–65 (stating "projected disposable income" is not synonymous with "disposable income"); *LaPlana*, 363 B.R. at 265–66 (mentioning forward-looking concept allows consideration of change in circumstances).

¹¹⁴ See *Purdy*, 2007 Bankr. LEXIS 2598, at *10 (stating past income is not "to be received" and therefore projected disposable income is forward-looking); *In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006) (finding "to be received" compelling evidence of congressional intent that projected disposable income be based on "income actually to be received by the debtor during the commitment period, rather than prepetition average income").

¹¹⁵ 11 U.S.C. § 1325(b)(1)(B) (2006).

¹¹⁶ See *Kelly v. Robinson*, 479 U.S. 36, 43–44 (1986) (emphasizing cannot evaluate text of specific statute by itself); *In re Thompson*, 418 F.3d 362, 368 (3d Cir. 2005) (indicating when evaluating statutory language of provision must look at other sections for guidance).

throughout the Bankruptcy Code,¹¹⁷ a holding that it is either a temporal or a monetary requirement may substantially affect the usefulness or the function of other Bankruptcy Code provisions. Specifically, a ruling would affect BAPCPA's financial reporting requirements and BAPCPA's time restrictions for receiving a discharge from bankruptcy.

Under section 521(f), a debtor is required after confirmation to file with the court a copy of the debtor's annual tax returns and a statement of the debtor's income and expenditures for each year the debtor remains in chapter 13.¹¹⁸ This provision provides a mandate for the court to reevaluate a debtor's financial situation.¹¹⁹ Implicitly this suggests that the debtor has an ongoing obligation under chapter 13 and that the amount owed is subject to change; otherwise this section serves no purpose because post-confirmation income would not be relevant to any bankruptcy issue.¹²⁰ Consequently, interpreting the applicable commitment period as a monetary requirement would render this requirement irrelevant or worse, abusive to debtors.¹²¹ This is because as a multiplier the applicable commitment period simply sets an amount due and does not change, rendering the need for reporting a debtor's income useless.¹²² Accordingly, this requirement contemplates that a debtor must make an ongoing obligation to commit future increases in income

¹¹⁷ The term "applicable commitment period" is found in sections 1325 and 1329. 11 U.S.C. §§ 1325(b)(1)(B), 1325(b)(4), 1329(c) (2006); see *In re Frederickson*, 368 B.R. 825, 830 n.6 (Bankr. E.D. Ark. 2007), *aff'd*, 2007 Bankr. LEXIS 3151 (B.A.P. 8th Cir., Sept. 24, 2007) (stating that section 1329(c) is only reference to "applicable commitment period" outside section 1325).

¹¹⁸ 11 U.S.C. § 521(f); see *In re Robertson*, 370 B.R. 804, 809 n.6 (Bankr. D. Minn. 2007) (observing debtors must provide income tax returns and other tax-related documents); *In re Lenton*, 358 B.R. 651, 660 (Bankr. E.D. Pa. 2006) ("§ 521(f) requires a debtor, upon request, to file tax returns and updated statements of income and expenses during the pendency of the case.").

¹¹⁹ See Becket & Lee, *supra* note 6, at 16 (observing that temporal interpretation of "applicable commitment period" means that unsecured creditors can benefit from increase in debtor's income); Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 MO. L. REV. 1035, 1043 n.41 (2006) (stating modification of plan occurs because debtor is required to continuously file tax return information throughout life of plan).

¹²⁰ *In re Slusher*, 359 B.R. 290, 304 (Bankr. D. Nev. 2007) ("With an ongoing obligation by the debtor to remain in bankruptcy for the plan term, interested parties can monitor the debtor and capture any increase in the debtor's income"); *In re Davis*, 348 B.R. 449, 458 (Bankr. E.D. Mich. 2006) (finding post-confirmation reporting requirements are meant to assist creditors in capturing debtors' increased earning).

¹²¹ See *In re Arsenault*, No. 06-05452-MGW, 2007 Bankr. LEXIS 2282, at *12-13 (Bankr. D. Fla. July 3, 2007) (indicating section 521(f) serves no purpose if projected disposable income is based on a fixed historical amount); *In re Fuller*, 346 B.R. 472, 482 (Bankr. S. D. Ill. 2006) (noting that without ability to modify plan payments, section 521(f) would be meaningless); *In re McGuire*, 342 B. R. 608, 614 n.22 (Bankr. W. D. Mo. 2006) ("[I]f debtors are not permitted (or in some cases, required) to change their plan payments due to changes in their actual income and expenses, § 521(f) would serve no purpose.").

¹²² See *In re Nance*, 371 B.R. 358, 370 (Bankr. S.D. Ill. 2007) (pointing to section 521(f)'s requirement of filing income tax returns as evidence against permitting debtors to "exit bankruptcy immediately upon payment of their secured creditors"); *In re Beckerle*, 367 B.R. 718, 719-21 (Bankr. D. Kan. 2007) (citing Bankruptcy Code's "financial reporting requirements" as inconsistent with a monetary interpretation of applicable commitment period); *In re Davis*, 348 B.R. 449, 458 (Bankr. E. D. Mich. 2006) (rejecting view of applicable commitment period as multiplicand because view is inconsistent with section 521(f)'s requirement of filing post-petition tax returns).

to their plan.¹²³ The applicable commitment, as a result, must be a temporal requirement.

A debtor is limited, however, from receiving a discharge, under section 1328(f), if the debtor previously obtained a chapter 13 discharge in the preceding two year period.¹²⁴ Given this provision and that the applicable commitment period is either three or five years, supporters of a monetary interpretation assert that the applicable commitment period must be a pure multiplier.¹²⁵ This is because any fixed period of time greater than two years renders section 1328(f)'s two year waiting period between chapter 13 discharges as a meaningless provision.¹²⁶ Under a temporal interpretation, every debtor subjected to the applicable commitment period would be required to remain in bankruptcy for longer than a two year period, eliminating the need for this provision.¹²⁷ This argument, however, is subjectively flawed because the applicable commitment period only applies after the trustee or holder of an unsecured claim objects to confirmation of a plan.¹²⁸ Absent an objection, the applicable commitment period never becomes an issue.¹²⁹ Thus, even as a temporal requirement the applicable commitment period would not render section 1328(f) moot; section 1328(f) would provide the necessary limit on chapter 13 plans that are not objected to, just as the applicable commitment period provides a limit on plans

¹²³ See *McGuire*, 342 B.R. at 614 n.22 (discussing section 521(f)'s requirement of filing annual tax returns as basis for allowing interested parties to change plan payments due to change in debtor's actual income and expenses); see also *Beckerle*, 367 B.R. at 720–21 n.12 (pointing out section 521(f)'s requirement of "submission of annual, post-petition tax returns"); Anderson, *supra* note 61, at 11 (noting BAPCPA requires debtor to disclose annual income and expenses for each year in a chapter 13 plan).

¹²⁴ 11 U.S.C. § 1328(f) (2006).

¹²⁵ Becket & Lee, *supra* note 6, at 45 (arguing monetary interpretation of applicable commitment period gives meaning to section 1328(f)'s bar on discharges, where discharge took place within last two years). See generally Anderson, *supra* note 61, at 12–13 (noting court can not grant chapter 13 discharge if debtor already received chapter 13 discharge within past two years); Landry, *supra* note 23, at 113–14 (indicating chapter 13 debtor can not receive discharge from chapter 13 if debtor already received chapter 13 discharge within two-year period preceding order date of subsequent chapter 13 filing).

¹²⁶ See *supra* note 125 and accompanying text.

¹²⁷ See Becket & Lee, *supra* note 6, at 45 (noting temporal interpretation of applicable commitment period as inconsistent with section 1328(f)); see also *Chapter 13 Discharge as Bar to Further Chapter 13 Relief*, 8 COLLIER ON BANKRUPTCY, ¶ 1328.06[2], at 1328–36 to –37 (Resnick & Sommer eds., 15th ed. rev. 2007) (observing section 1328(f)(2) to "rarely be applicable, because most chapter 13 cases in which discharges are granted last for three to five years").

¹²⁸ 11 U.S.C. § 1325(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 . . ." (emphasis added)).

¹²⁹ *In re Girodes*, 350 B.R. 31, 35 n.3 (Bankr. D.N.C. 2006) ("Pursuant to § 1325(b), only if an objection to confirmation is made by the trustee . . . the requirement imposed that the plan provide for all the debtor's projected income in the applicable commitment period. A court, absent an objection, has no authority to impose this requirement."); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"*, 79 AM. BANKR. L.J. 191, 227 (2005) [hereinafter *Representing Consumers Under BAPCPA*] (clarifying that applicable commitment period "is not applicable unless an objection to confirmation is filed"); cf. *In re Davis*, 68 B.R. 205, 209–10 (Bankr. S.D. Ohio 1986) ("[I]n the absence of a pending objection by the holder of an allowed unsecured claim or the Chapter 13 Trustee, the bankruptcy court is not authorized to raise and determine, *sua sponte*, confirmation questions under § 1325(b).").

that are objected to at confirmation.¹³⁰ Therefore, section 1328(f) does not just support a monetary view; it has meaning under both a temporal and monetary theory.

Accordingly, while a monetary argument can be made, on a whole, the Bankruptcy Code provides greater support for a temporal interpretation. The plain language of both section 521 and section 1328 has substantial meaning under a temporal interpretation, however under a monetary view section 521 essentially becomes superfluous. Thus, the language of section 1325(b) and its related provisions are indicative of Congress's intent to provide a temporal limitation.

B. Legislative History

In order to decipher ambiguous statutory provisions, a court should look to the legislative history to discern congressional intent.¹³¹ Enforcement of an ambiguous statute consequently should reflect the goals Congress sought to achieve when drafting the provision.¹³² Given BAPCPA's inconsistent statutory language, when determining the correct use of the term "applicable commitment period," it is necessary to consider the legislative history.¹³³ Despite BAPCPA's minimal legislative history, it is clear that Congress intended the term "applicable commitment period" to provide a temporal limitation on the length of a chapter 13 plan.

Throughout the Report of the Committee on the Judiciary,¹³⁴ that accompanied the BAPCPA legislation, Congress explicitly provided for a fixed duration and did not refer to the applicable commitment period as a multiplier.¹³⁵ In summarizing the Act's provisions, the section by section analysis entitled section 318 of the Act¹³⁶ as

¹³⁰ Where the applicable commitment period does not apply there is no required minimum plan length, suggesting section 1328(f)'s two year period between chapter 13 discharges can act as an efficient limitation on the frequency of chapter 13 filings. See *supra* notes 125–27 and accompanying text.

¹³¹ *In re Armstrong*, 370 B.R. 323, 328 (Bankr. E.D. Wash. 2007) (citing *In re First T.D. & Inv., Inc.*, 253 F.3d 520 (9th Cir. 2001)); see *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (stating evaluation of statute's surrounding circumstances may indicate Congress intended something different than what is written); *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892) (requiring courts to interpret statutes to reflect congressional intent).

¹³² See *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (indicating court's job is determination of legislative intent); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542–43 (1940) (mentioning courts must determine Congress's purpose for enacting statute in order to understand statute's meaning).

¹³³ See *Hot Topics and Issues*, *supra* note 67 (stating BAPCPA is "quagmire of inconsistencies and inoperable language"); *Representing Consumers Under BAPCPA*, *supra* note 129, at 193 (noting BAPCPA's poor drafting will require judges to exercise their judgment when determining meaning of BAPCPA's provisions); Whitford, *supra* note 60, at 189 (asserting courts have struggled with many ambiguities introduced by BAPCPA).

¹³⁴ Report of the Committee on the Judiciary, House of Representatives, to Accompany S. 256, H.R. REP. NO. 109-31, pt. 1 (2005).

¹³⁵ See *In re Cushman*, 350 B.R. 207, 212 (Bankr. D.S.C. 2006) (indicating Bankruptcy Code only refers to applicable commitment period as time period); see also *In re Slusher*, 359 B.R. 290, 301 (Bankr. D. Nev. 2007) (examining section 1325(b) reveals plain language of applicable commitment period is fixed length of time).

¹³⁶ Section 318 of the Act includes modifications made to 11 U.S.C. 1325(b). H.R. REP. NO. 109-31, at 79.

"Chapter 13 Plans to Have a 5-Year Duration."¹³⁷ The summary states that the applicable commitment period must provide for payments over a five year period, for above the median income debtors and the period may only be shortened if the plan provides for full payment of the unsecured claims.¹³⁸ Moreover, even the dissenting views within the report demonstrate that legislators considered the provision as a temporal concept. When describing chapter 13, the dissent specifically states a debtor is required to pay creditors, out of their future income, over a 3–5 year period.¹³⁹ As a result, it is clear that Congress intended the applicable commitment period to have a fixed connotation as a specific time period in which a debtor would be required to submit his disposable income.

Furthermore, congressional testimony during Senate debates over BAPCPA indicates senators, including Senators Feingold, Kennedy and Hatch, considered chapter 13 to have a fixed duration. For example, on March 1, 2005, Senator Hatch referred to a debtor's commitment under chapter 13 as not a "crippling lifetime commitment . . . repayment plans are only between 3 and 5 years."¹⁴⁰ Senator Kennedy, also argued during Senate debates that chapter 13 will force debtors to pay for five years.¹⁴¹ Additionally, Senator Feingold introduced an amendment seeking to allow the term of a confirmed plan to be reduced to a term equal to the applicable commitment period as a three year term, under certain circumstances.¹⁴² Although the provision was withdrawn,¹⁴³ the language suggests that Senator Feingold considered the concept of the applicable commitment period to be a fixed length rather than just a multiplier. Extrapolating from the comments of these three senators would suggest that legislators considered the applicable commitment period as a plan length and thus the legislative intent behind enacting the applicable commitment period was temporal in nature.

It took eight years for Congress to pass the BAPCPA reforms, during which time the applicable commitment period provisions that were introduced were either virtually identical or at a minimum thematically the same.¹⁴⁴ As a result, looking at

¹³⁷ *Id.*

¹³⁸ *Id.* ("The applicable commitment period may be less if the plan provides for payment in full of all allowed unsecured claims over a shorter period.").

¹³⁹ *Id.* at 550 (Dissenting Views) ("Under chapter 13, a debtor is permitted to retain his or her property, but is required to pay to creditors over a 3-5 year period out of future income . . .").

¹⁴⁰ 151 CONG. REC. 21, S1843 (daily ed. Mar. 1, 2005) (statement of Sen. Hatch).

¹⁴¹ 151 CONG. REC. 27, S2323–24 (daily ed. Mar. 9, 2005) (statement of Sen. Kennedy).

¹⁴² 151 CONG. REC. 25, S2137 (daily ed. Mar. 7, 2005) (Proposed S.AMDT.96) (stating "the debtor's plan may be modified to reduce the term of the plan to a time period equal to or greater than the applicable commitment period"); see 151 CONG. REC. 27, S2315 (daily ed. Mar. 9, 2005) (statement of Sen. Feingold) ("[I]f a debtor's income decreases during the bankruptcy case to less than the median income, then a debtor who is at that time on a 5-year plan can seek to have the plan reduced to a 3-year plan.").

¹⁴³ 151 CONG. REC. 28, S2463 (daily ed. Mar. 10, 2005).

¹⁴⁴ See Robin Jeweler, *CRS Report for Congress: Consumer Bankruptcy Reform in the 109th Congress: Background and Issues*, at CRS-1 (February 3, 2005), available at <http://www.abiworld.org/pdfs/s256/CRS-background.pdf> [hereinafter *CRS Consumer Bankruptcy Reform*] (mentioning since 1998 the main provisions of attempted bankruptcy reform bills remained the same until passed under BAPCPA); Robin Jeweler, *CRS Report for Congress: The "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," S. 256, in the 109th Congress*, at Summary (February 9, 2005), available at

the legislative process throughout the entire period provides a strong inference that Congress intended the applicable commitment period to be a temporal concept. The National Bankruptcy Review Commission (hereinafter the "Commission") was established by Congress to review the current status of the Bankruptcy Code.¹⁴⁵ The Commission's report¹⁴⁶ reflected a liberal approach to consumer bankruptcy that would effectively increase a creditor's losses and would consequently increase the price of credit to consumers.¹⁴⁷ The Commission, therefore, failed to recommend enough changes to protect creditors from abusive practices. As a result, within days after the Commission released its report, legislators rejected the Commission's recommendations by not including the recommendations in a bill introduced in the Senate.¹⁴⁸

The dissent within the report, however, urged Congress to specifically codify a five year plan in certain cases, arguing that many courts already confirmed five year plans and a five year plan would limit abusive practices.¹⁴⁹ Although it cannot be ascertained whether Congress included the applicable commitment period, with a five year requirement, based on the dissent's recommendations, the BAPCPA reform as a whole reflects the views of the Commission's minority.¹⁵⁰ For example, within the same section of the dissent, the minority called for annual review of a

<http://www.abiworld.org/pdfs/s256/CRS-S256.pdf> (noting BAPCPA is similar to a bill passed by the House in the 108th Congress); see also Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 558–59 (2005) (stating Bankruptcy Abuse Prevention and Consumer Protection Act of 2003 was virtually identical to its predecessor).

¹⁴⁵ Congress created the Commission in 1994 as part of the Bankruptcy Reform Act of 1994. Pub. L. No. 103-394, § 602, 108 Stat. 4106, 4147 (1994).

¹⁴⁶ The Commission's report suggested over 170 recommendations. The recommendations were based upon hearings and discussions by everyone that participates within the bankruptcy process, including practitioners, judges, trustees, accountants, bank representatives and academics. See NAT'L BANKR. REV. COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT*, preface i, iv, ix (1997) [hereinafter *COMMISSION REPORT*].

¹⁴⁷ See James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 864 (2006) (indicating that Commission's report reflects liberal views of its majority's leader); George J. Wallace, *The National Bankruptcy Review Commission and Consumer Bankruptcy: Proposals in Search of a Rationale*, 5 AM. BANKR. INST. L. REV. 341, 346 (1997) ("The net effect of the changes . . . would be to increase significantly the bankruptcy losses experienced by secured creditors . . . with little offsetting gain . . . [T]he effect of those losses would be to increase the price of credit to consumers who do pay their bills and encourage increased bankruptcy use by debtors with some ability to pay.").

¹⁴⁸ See Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 18 (1998) (asserting how Congress chose to ignore proposals made by Commission); Richard L. Stehl, *The Failings of the Credit Counseling and Debtor Education Requirements of the Proposed Consumer Bankruptcy Reform Legislation of 1998*, 7 AM. BANKR. INST. L. REV. 133, 143–44 (1999) (stating how legislators dismissed Commission's proposals); Wallace, *supra* note 147, at 341.

¹⁴⁹ Recommendation for Reform of Consumer Bankruptcy by Four Dissenting Commissioners, in *COMMISSION REPORT*, *supra* note 146, at 1085–87 (stating "Chapter 13 should be strengthened as follows . . . specific approval of 5-year plans should be codified").

¹⁵⁰ See Corinne Cooper and Catherine E. Vance, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 285 (2005) (stating "beginning in the 105th Congress, when BAPCPA was first introduced, nearly every version of the bill reflected the view of the Commission's minority").

debtor's tax returns, so a trustee or unsecured creditor can capture future increases in a debtor's actual income.¹⁵¹ This provision was codified within BAPCPA under 11 U.S.C. §521(f).¹⁵² This demonstrates therefore, at a minimum, Congress considered the need for a fixed plan length. Additionally, circumstantially the two recommendations together suggests that Congress adopted the applicable commitment period as a fixed plan length in order to give meaning to section 521 and to allow a trustee to increase plan payments based upon a review of a debtor's tax return.¹⁵³

Accordingly, the legislative history as a whole indicates Congress considered the applicable commitment as a temporal term. Congress's use of a fixed term throughout the enactment process is consistent with Congress's expressed goals for the BAPCPA reform; which, among other things, included making it harder to file bankruptcy in order to control opportunistic and abusive practices.¹⁵⁴ Therefore, the legislative history coupled with the statutory construction of BAPCPA indicates a policy in favor of a fixed length of time and not the use of the applicable commitment period as a multiplicand.

IV. BAPCPA POLICIES & THEIR RELATION TO THE APPLICABLE COMMITMENT PERIOD

Additional support for the temporal interpretation of the applicable commitment period can be found in the interplay between the applicable commitment period and other bankruptcy practices and policies. This is because ambiguous provisions, such as the applicable commitment period, should be interpreted to effectuate the intent of the legislature.¹⁵⁵ Where Congress has failed to clearly define a specific

¹⁵¹ See Recommendation for Reform of Consumer Bankruptcy by Four Dissenting Commissioners, in COMMISSION REPORT, *supra* note 146, at 1085–87. The dissent specifically stated:

A better system would allow repayment plans to be completed based on actual income, rather than the speculative projections made in the plan proposal and confirmation process. One suggested solution is an annual review of plans based on debtors' tax returns. Section 521 would be amended to require that Chapter 13 debtors making payments under a confirmed plan must provide copies of all tax returns they file to their trustee. If a debtor's reported income significantly changes, the trustee or any party in interest could move for the plan to be modified.

Id. at 1086–87.

¹⁵² See 11 U.S.C. § 521(f) (2006).

¹⁵³ See *supra* Section III.A.3 (discussing section 521).

¹⁵⁴ See Anderson, *supra* note 61, at 1 (indicating purpose of BAPCPA was to make filing more difficult); Singer, *supra* note 59, at 305–06 (suggesting name of BAPCPA itself signals predominant factor behind reforms).

¹⁵⁵ See *In re Fuger*, 347 B.R. 94, 96 (Bankr. D. Utah 2006) (noting where language is ambiguous courts should consider congressional intent); *Hot Topics and Issues*, *supra* note 67 (mentioning that conflict over plain language of statute already exists); see also *In re Coffey*, 339 B.R. 689, 696 (Bankr. N.D. Ind. 2006) ("The ultimate purpose of statutory construction is to ascertain and give meaning to the intent of the legislative body which enacted the statute.").

statutory provision, the courts use policy considerations as extrinsic evidence of what Congress intended the provision to mean.¹⁵⁶ Although strong policy arguments can be marshaled in favor of both a temporal and a monetary interpretation, the policy arguments for a temporal meaning best effectuate the goals of BAPCPA.

A. The Means Test

The cornerstone of the BAPCPA reform was the creation of the chapter 7 means test.¹⁵⁷ Under this test, debtors believed to have the ability to repay a meaningful portion of their debts will be required to repay a portion of their debts through a repayment plan.¹⁵⁸ This legislation was needed to deter the unnecessary bankruptcies that were harming many creditors, while still providing relief to those debtors who need it.¹⁵⁹ While the application of the means test provides strong support for a monetary interpretation of the applicable commitment period, the purpose of the means test is consistent with a temporal interpretation. Therefore, given that the applicable commitment period is ambiguous as to its use, the court should interpret the applicable commitment period as a temporal requirement because it is in accord with the reasons for the BAPCPA reforms.

A debtor who fails the means test is presumptively assumed to be abusing the bankruptcy system and is effectively forced into a chapter 13 plan, if the debtor still wants to file bankruptcy.¹⁶⁰ As such, it would be incongruous for debtors who have the ability to pay and are not allowed to participate in a chapter 7 liquidation, to exit a plan by paying a pre-determined minimum amount that is less than a hundred-

¹⁵⁶ *In re Purdy*, No. 06-30679-LMK, 2007 Bankr. LEXIS 2598, at *11 (Bankr. N.D. Fla. August 6, 2007) (stating courts are to look beyond language when statute is ambiguous); *In re Turkowitch*, 355 B.R. 120, 125 (Bankr. E.D. Wis. 2006) (indicating court is only to look beyond language if statute is not clear); *In re Patton*, 209 B.R. 98, 101 (Bankr. D. Tenn. 1997) (stating courts must look to legislative history of statute if intent of legislature is not clear).

¹⁵⁷ H.R. REP. NO. 109-31, pt. 1, at 2 (stating primary purpose of legislation is an "income/expense screening mechanism," also known as means test).

¹⁵⁸ See 11 U.S.C. § 707(b) (2006); see also *In re Slusher*, 359 B.R. 290, 303 (Bankr. D. Nev. 2007) (stating "Congress added the means test to ensure that above-median debtors who could afford to repay their creditors were required to do so by entering chapter 13"); Becket & Lee, *supra* note 6, at 44 (providing that section 707(b) subjects above the median debtors to means test, in order to require debtors, who can afford to repay, to actually pay their creditors).

¹⁵⁹ See New Democrat Coalition Press Release, *supra* note 54 (stating Representative Ron Kind said "[t]his bankruptcy bill strikes an equitable balance between essential protections and responsible reform necessary to curb abuses of the current code by people with the financial means to pay their debt . . ."); White House Press Release, *supra* note 2 (indicating reform still provides relief to honest debtor while making harder for serial filers to continue to file bankruptcy and avoid their financial obligations).

¹⁶⁰ Philip S. Hurak, *Issues With the Title 11 § 101(10A) Definition of "Current Monthly Income": It's Not Current, Not Monthly, and Not Always Income*, 32 DAYTON L. REV. 177, 178 (2006) (suggesting means test is standard to determine finding of abuse); Daniel Morman, *Finding a Loophole in the Means Test Without Collusion: Will Chapter 7 Involuntaries Be on the Rise?*, 24 AM. BANKR. INST. J. 6, 6 (September 2005) (failing chapter 7 means test provides presumption of abuse); see Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 665 (2005) (indicating means test prevents those with ability to pay from filing chapter 7 case).

percent of the claim.¹⁶¹ Under BAPCPA, debtors are required to make a good-faith effort to repay what they can afford to unsecured creditors.¹⁶² Debtors with the means to pay must commit their disposable income, which includes any increases in a debtors' income for a period of time or they must pay a claim in full. Therefore, debtors exiting a plan based on a pre-determined amount would frustrate the purpose of the means test; to prevent debtors, who had the means to repay their debts, from escaping their responsibility of paying what they can afford. An ongoing commitment to pay back one's debt is thus consistent with the goal of the means test; those who could afford to repay their creditors are required to do so.¹⁶³

The actual application of the means test, however, supports the justification for a monetary amount. Congress implemented the means test as purely a mechanical test.¹⁶⁴ Additionally, while the means test prevents some debtors from filing for chapter 7, based on the presumption that these debtors have the ability to pay, many of these debtors under chapter 13 have either a zero or negative disposable income.¹⁶⁵ This suggests that these debtors do not actually have the ability to pay back their debts, and thus it would make little sense to require these debtors to remain in bankruptcy, for a period of time.

A purely mathematical approach to the applicable commitment period, however, would not reflect a debtor's actual situation and thus could not have been Congress's intention.¹⁶⁶ Using the applicable commitment period as a multiplicand, based on a debtor's "current monthly income," would require a debtor's pre-petition

¹⁶¹ See *In re Lanning*, No. 06-41037, 2007 Bankr. LEXIS 1639, *8-9 (Bankr. D. Kan. May 15, 2007) (mentioning means test ensures debtors with ability to pay are required to commit to repayment plan under chapter 13); *In re Davis*, 348 B.R. 449, 457-58 (Bankr. E.D. Mich. 2006) (stating if purpose of means test is to direct debtors with ability to repay into chapter 13 repayment plans, it is unlikely Congress would allow debtor to exit chapter 13 plan at pre-determined discounted rate); Becket & Lee, *supra* note 6, at 44 (arguing that given BAPCPA's focus on ability to repay, absent one hundred percent repayment plan, debtor should not be able to exit plan earlier).

¹⁶² See *In re Briscoe*, No. 06-00458, 2007 Bankr. LEXIS 2943, at *39-40 (Bankr. D.D.C. September 4, 2007) (noting chapter 13 imposes good-faith requirement in amount proposed for repayment plan); *In re Sawdy*, 362 B.R. 898, 910-911 (Bankr. E.D. Wis. 2007) (indicating President Bush stated purpose of BAPCPA was to require debtors to make good-faith effort to repay). See generally *In re Keenan*, 364 B.R. 786, 805 (Bankr. D.N.M. 2007) (stating chapter 13 plan can be confirmed where debtor in good-faith attempts to satisfy creditor's claims).

¹⁶³ See *Slusher*, 359 B.R. at 303 (noting means test ensures those with ability to pay actually make good on their commitments by forcing these debtors into chapter 13 repayment plan); Charles J. Tabb and Jillian McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463, 463-64 (2007) (indicating debtors with ability to pay can not receive chapter 7 discharge); Becket & Lee, *supra* note 6, at 44 (suggesting that because of means test early pay-off plans at less than 100 percent should be denied).

¹⁶⁴ See *In re Wilkins*, 370 B.R. 815, 819 (Bankr. C.D. Cal. 2007) ("[The means test] is a mechanical test that requires the debtor to assume as expenses certain IRS standards, rather than using the actual expenses of the debtor in these categories."); *In re Mitchell*, 368 B.R. 845, 849 (Bankr. D. Neb. 2007) ("It is a mechanical test to be applied as set forth in the Official Form."); *Representing Consumers Under BAPCPA*, *supra* note 129, at 193 ("[P]rovisions purport to provide a bright line test that will determine who is 'abusing' Chapter 7 relief . . .").

¹⁶⁵ See *infra* Section IV.C.

¹⁶⁶ See *In re Gress*, 344 B.R. 919, 922-23 (Bankr. W.D. Mo. 2006) ("Congress could not have intended a purely mechanical application of the means test to determine the amount above-median debtors are required to pay to unsecured creditors.").

averaged income to be similar to the debtor's income at confirmation.¹⁶⁷ Accordingly, with a fixed monetary value, a change in the debtor's income would cause the debtor's chapter 13 plan to conflict with the purpose of the means test and chapter 13. This is because a debtor's income changes over time and an unsecured creditor, therefore, should be able to capture a debtor's income, if the debtor has a greater ability to repay.¹⁶⁸ As a result, construing the applicable commitment period as purely a mechanical test, similar to the means test would reduce the effectiveness of a chapter 13 plan and render the BAPCPA reforms inconsistent with its expressed goals.

B. "Cashing-Out" of Chapter 13 Early

At the center of the conflict over the definition of the applicable commitment period, is a tension between two fundamental bankruptcy policies; a debtor's right to a "fresh start" versus a creditor's right, under chapter 13, to receive an ongoing commitment from the debtor to repay.¹⁶⁹ The critical question courts have struggled with is whether a debtor exiting a plan earlier than a fixed commitment would allow is simply abusing the system or receiving the necessary financial freedom to start-over.¹⁷⁰ Although a monetary interpretation gives the debtor greater flexibility on when to receive a discharge and move on from bankruptcy, the benefits of a chapter 13 plan come with additional burdens. BAPCPA made clear that while an honest debtor will receive relief from his creditors, the price of a discharge under chapter 13 is a debtor's ongoing commitment to protect an unsecured creditor's interest.

When filing for bankruptcy, consumers may have the option of choosing how to seek financial rehabilitation. Chapter 13, while providing an expanded discharge

¹⁶⁷ *In re Nance*, 371 B.R. 358, 363 (Bankr. D. Ill. 2007) (discussing concerns about changes in income from pre-petition to confirmation causing impractical results); *In re Fuller*, 346 B.R. 472, 483 (Bankr. S.D. Ill. 2006) ("[I]t makes little sense to freeze the calculation of the debtor's income at a particular—possibly arbitrary—point in time and set that number in stone."); *In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006) (concluding projected disposable income refers to debtor's actual income received instead of pre-petition average income).

¹⁶⁸ See *Nance*, 371 B.R. at 363 (discussing if debtor's income for plan is not based on debtor's actual income, creditors may be cheated out of potential payments); *Hardacre*, 338 B.R. at 722 (discussing inequity if amount committed to plan by debtor varies from actual income post-petition); see also *In re Kibbe*, 361 B.R. 302, 308 (B.A.P. 1st Cir. 2007) (observing courts have held that because of the word "projected" in "projected disposable income" creditors can reexamine debtor's plan if income changes).

¹⁶⁹ Compare *In re Fuger*, 347 B.R. 94, 101 (Bankr. D. Utah 2006) (indicating it makes little sense to keep debtor in chapter 13 if debtor can satisfy requirements early, absent payment in full of allowed unsecured claims) and *In re Mathis*, 367 B.R. 629, 636 (Bankr. N.D. Ill. 2007) ("Nothing in the Code limits a debtor's ability to pre-pay plan payments, as they often do when they sell or refinance their home.") with *Nance*, 371 B.R. at 369 (observing "applicable commitment period" on its face, connotes obligation to do something over time). See White House Press Release, *supra* note 2 (stating Act tries to protect an honest debtor's need for relief with creditor's ability to reclaim unpaid debts).

¹⁷⁰ See *supra* note 169 and accompanying text. See generally *In re Hanks*, 362 B.R. 494, 500 (Bankr. D. Utah 2007) (indicating while BAPCPA reforms attempted to curb abusive practices, it is not clear if receiving "fresh start" is still primary policy of Bankruptcy Code).

and the ability to retain some of a debtor's assets, does come at a price.¹⁷¹ In exchange for these benefits, section 1325 requires a debtor to commit to making periodic payments of a debtor's disposable income.¹⁷² Under a temporal view, a debtor should not be able to freely choose when to exit a plan; at confirmation a debtor agrees to a specified repayment plan that cannot arbitrarily be set-aside.¹⁷³ Debtors who seek to exit a plan early are reneging on their commitment to unsecured creditors, by robbing creditors of a chance to seek modification of the debtor's commitment.¹⁷⁴ Critics argue that a temporal ideology treats debtors harshly and leaves a debtor unable to adjust to financial changes during their applicable commitment period.¹⁷⁵ The Bankruptcy Code, however, does provide a debtor with various alternatives to meet a change in financial circumstances. A debtor unable to meet his plan, as confirmed, has the option of seeking a modification, under section 1329, or when modification is unavailable a hardship discharge, under section 1328.¹⁷⁶

While the burden of a three or five year commitment may deter some from filing chapter 13, debtors who have a choice between chapters must choose between

¹⁷¹ See *In re Slusher*, 359 B.R. 290, 304 (Bankr. D. Nev. 2007) ("[T]he essence of a chapter 13 case is that the debtor has made an ongoing *commitment* to provide all disposable income over a period of time to repay creditors."); see also *In re Davis*, 348 B.R. 449, 456 (Bankr. E.D. Mich. 2006) (observing terms of chapter 13 require action by debtor over period of time). See generally *Overview of Chapter 13*, 8 COLLIER ON BANKRUPTCY, ¶ 1300.01, at 1300–10 (Resnick & Sommer eds., 15th ed. rev. 2007) (describing generally how chapter 13 creates repayment plan as opposed to chapter 7 which liquidates debtor's assets).

¹⁷² See *In re Crittendon*, No. 06-10322 C-13G, 2006 Bankr. LEXIS 2172, at *15–16 (Bankr. D.N.C. September 1, 2006) (noting debtors subject to applicable commitment period are required to commit to repayment plan of either 36 or 60 months); *Nance*, 371 B.R. at 372 (requiring debtor's to commit to fixed repayment plan equal to applicable commitment period); *CRS Consumer Bankruptcy Reform*, *supra* note 144, at CRS-2 (mentioning chapter 13 is consumer debtor's reorganization over which debtor's debts are paid off as part of set repayment plan).

¹⁷³ Becket & Lee, *supra* note 6, at 44 (stating confirmed plan binds not only creditors but debtors to specific repayment plan). See *In re Gress*, 344 B.R. 919, 923 (Bankr. W.D. Mo. 2006) (stating absent payment in full of all allowed unsecured claims, debtor must pay all projected disposable income during applicable commitment period); *In re McGuire*, 342 B.R. 608, 615 (Bankr. W.D. Mo. 2006) (indicating applicable commitment period can only be shortened if unsecured creditors are paid in full).

¹⁷⁴ See *In re Girodes*, 350 B.R. 31, 38 (Bankr. D.N.C. 2006) (noting if debtors exits a plan early they deny creditors and trustees ability to modify plan during full applicable commitment period); see also *Slusher*, 359 B.R. at 304 (providing chapter 13 debtors make commitment to unsecured creditors to pay disposable income); *Gress*, 344 B.R. at 923 (mentioning chapter 13 debtors have commitment to repay unsecured creditors during life of plan unless debtor pays all unsecured creditors in full).

¹⁷⁵ See *Hot Topics and Issues*, *supra* note 67 (suggesting debtor's circumstances may change requiring debtor to pay off his plan earlier than temporal definition would allow). See generally *In re Mathis*, 367 B.R. 629, 636 (Bankr. N.D. Ill. 2007) ("Prepayment allows creditors to be paid sooner rather than later and a debtor's otherwise significant risk of failure in chapter 13 is eliminated."); *In re Mangum*, 343 B.R. 185, 189 (Bankr. N.D. Ill. 2006) ("[Creditors] receive their money early and completely eliminate the risk of the debtor's default over a three-year period, which is fairly high in a Chapter 13 case.").

¹⁷⁶ *In re Zayas*, No. 06-13070, 2007 Bankr. LEXIS 1104, at *11 (Bankr. N.D. Ohio April 2, 2007) (indicating debtor in bankruptcy has various options when debtor's financial circumstances change); *In re Hibble*, 371 B.R. 730, 732–33 (Bankr. E.D. Pa. 2007) (noting where debtor's financial condition declines, debtor may seek conversion, modification, or hardship discharge); see *In re Young*, 370 B.R. 799, 803 (Bankr. D. Wis. 2007) (suggesting under certain circumstances Bankruptcy Code provides relief to debtor who loses ability to repay).

a faster chapter 7 process and the benefits of chapter 13.¹⁷⁷ Although BAPCPA's intention was to direct debtors into chapter 13, the potential decrease in voluntary chapter 13 filings is not wholly inconsistent with the BAPCPA legislation. BAPCPA was concerned with directing opportunistic filers away from chapter 7 and into chapter 13. This goal was achieved through the means test, which forced potentially abusive debtors into chapter 13 while retaining a chapter 7 option for debtors who had a low risk of using bankruptcy as a financial planning tool.¹⁷⁸ As such, debtors who voluntarily choose to enter chapter 13 should not be able to avail themselves of the benefits of chapter 13 without committing to its alleged drawbacks; to do so would allow the debtor to act opportunistically and harm the unsecured creditors. To take advantage of both the quick process of chapter 7 and the extended benefits of chapter 13, therefore, would be to create a new rule that was not considered by Congress.

Proponents of a monetary view argue, however, that the purpose of chapter 13 is to provide the creditor with some recovery and if a debtor through good fortune can pay off the total amount required, as determined at confirmation, the debtor should not be forced to remain in the plan or forced to only make the required monthly payments over a fixed commitment period.¹⁷⁹ Under this view, a debtor can fulfill his obligations at anytime, receive a discharge, and move on; epitomizing the "fresh start" ideal.¹⁸⁰ Debtors argue¹⁸¹ that an unsecured creditor, based on the time value of money, is better off under the monetary approach.¹⁸² Unsecured creditors do not receive interest on plan payments and therefore allowing a creditor

¹⁷⁷ See *supra* notes 1–3 and accompanying text; see also *Representing Consumers Under BAPCPA*, *supra* note 129, at 227 (noting five year applicable commitment period may deter some individuals from filing chapter 13).

¹⁷⁸ See *In re Slusher*, 359 B.R. 290, 303 (Bankr. D. Nev. 2007) (noting that means test only presumes some above median debtors as potentially abusive); McLaughlin, *supra* note 27, at 388–89 (mentioning means test only prevents those with ability to pay from filing chapter 7). See generally *Presumption of Abuse*, 6 COLLIER ON BANKRUPTCY, ¶ 707.05[2][a], at 707–40 to –41 (Resnick & Sommer eds., 15th ed. rev. 2007) (discussing bright line test and presumption of abuse).

¹⁷⁹ *In re Swan*, 368 B.R. 12, 24 (Bankr. D. Cal. 2007) (stating that it makes no sense for debtor to remain in chapter 13 once debtor has paid amount required to unsecured creditors); *In re Fuger*, 347 B.R. 94, 100 (Bankr. D. Utah 2006) (indicating debtor need not suffer through years of payments if good fortune will allow him to make an earlier payoff (citing *Miller v. Loan Star Mortg., Inc.* (*In re Miller*), 325 B.R. 539, 543 (Bankr. W.D. Penn. 2005))); see *Mangum*, 343 B.R. at 188 ("There is no language in the statute authorizing or requiring the Trustee to keep a case 'open,' in some sort of limbo, despite the fact that all plan payments have been made.").

¹⁸⁰ See *Swan*, 368 B.R. at 24–25 (stating once debtor pays an amount equal to all plan payments discharge should be granted); see also *Mangum*, 343 B.R. at 188 (suggesting once debtor pays amount required under plan, debtor does not have to remain in plan for fixed time period); *In re Miller*, 325 B.R. 539, 543 (Bankr. W.D. Pa. 2005) (opining debtor need not suffer through three years of payments if good fortune allows for earlier payoff because object of Code is to give creditors some recovery, even if it is not full recovery).

¹⁸¹ Note, typically the debtor is the one who supports a monetary interpretation of the applicable commitment period. See *supra* note 13 and accompanying text.

¹⁸² See *Swan*, 368 B.R. at 26 (suggesting present value of money today is greater than same amount paid over longer period of time). See generally *In re Fuger*, 347 B.R. 94, 101 (Bankr. D. Utah 2006) ("[I]t makes little sense to hold the debtor hostage for 60 months where the debtor can satisfy the requirements of § 1325(b)(1)(B) in a shorter period.").

to receive payment earlier is financially better than a prolonged repayment period, without interest as a compensation for the delay in payment.¹⁸³ These debtors also assert, an unsecured creditor would benefit from the reduced risk of a plan failing.¹⁸⁴ While the arguments made by a debtor supporting the monetary view represent the ideal way for a debtor to receive a "fresh start" from bankruptcy, they must be balanced against the unsecured creditor's interests. A problem with the monetary view is that despite a creditor's receipt of an immediate payment on part of their claim, the creditor loses the ability to capture potential increases in a debtor's income. The unsecured creditor has a choice and must make a calculated risk based upon many factors, of which may include the time value of money, when deciding whether to object to a repayment plan proposing a shorter plan length.¹⁸⁵ As a result, it appears Congress believed that providing creditors with an ongoing commitment would not only give unsecured creditors the ability to reclaim a larger portion of their claim but also would provide debtors with the financial discipline to recover from bankruptcy and receive a fresh start.¹⁸⁶ Thus, the applicable commitment period should be interpreted as a temporal plan length.

C. Application of a Debtor's Projected Disposable Income

While struggling to determine the meaning of the applicable commitment period, the courts have also been forced to grapple with the application of a debtor's "projected disposable income" and its interplay with the applicable commitment period. Even courts interpreting the applicable commitment period as a temporal

¹⁸³ *Swan*, 368 B.R. at 26 ("Creditors will be paid sooner under the monetary approach. This is of tremendous financial advantage, especially since unsecured creditors normally receive no interest on their claims."); *Miller*, 325 B.R. at 542 (observing "early payoff" actually increases value of money and thus benefits unsecured creditors).

¹⁸⁴ See *In re Mathis*, 367 B.R. 629, 636 (Bankr. N.D. Ill. 2007) (stating under monetary view prepayments eliminate creditors' risk that debtor will fail to met plan obligations in future); *Swan* 368 B.R. at 26 (noting that risk of default is lower on short-term plans, thereby increasing debtors chance of being paid); *Representing Consumers Under BAPCPA*, *supra* note 129, at 227 (observing longer periods of time makes plans more likely to fail).

¹⁸⁵ See *Representing Consumers Under BAPCPA*, *supra* note 129, at 227 (indicating trustee is not compelled to object to proposed plan and force above median income debtor into five year repayment plan). See generally Brian D. Lynch, *Chapter 13 Plan Modifications: The Next BAPCPA Battleground*, 25 AM. BANKR. INST. J. 14, 58 (Oct. 2006) (observing concern of unsecured creditors in determining commitment period is that debtor's income will increase or decrease after start of plan).

¹⁸⁶ See *supra* note 22 and accompanying text. The establishment of a chapter 13 repayment plan, over a period of time, is to teach a debtor financial management skills, including learning how to handle credit and living on a budget. Financial management, as a result, involves changing the behavior of debtors. See Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557, 563-64 (2001). Allowing a debtor to exit a plan earlier, without paying their unsecured creditors' claims off in full, impedes a debtor from acquiring the necessary skills to prevent the debtor from ending up back in bankruptcy. See Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 440 n.84 (1999) ("A trustee from a district with a 56% success rate attributed the 'high' rate to the working relationship between debtors and trustees, including meetings to identify potential problems with the plan, close communication with debtors throughout the case, and budget counseling.").

concept, disagree on whether a debtor with a zero or negative disposable income is subject to the applicable commitment period.¹⁸⁷ While the plain language can be read to support either view, ultimately the language coupled with congressional intent demonstrates that the applicable commitment period is to serve as a minimum plan length regardless of the existence of disposable income.

Debtors seeking to exit a plan early, in a temporal jurisdiction, argue that where their disposable income is zero the length of the applicable commitment period is irrelevant.¹⁸⁸ This is because a debtor with no disposable income is not required to make any payments to unsecured creditors.¹⁸⁹ As a result, these debtors assert there is no reason to keep them in bankruptcy if there is no ongoing obligation to make payments.¹⁹⁰ Alternatively, supporters of this view advance a mathematical argument for cases with zero disposable income, arguing that zero disposable income multiplied by an applicable commitment period, as a plan length, results in a plan length of zero because anything multiplied by zero is zero.¹⁹¹

According to both the text and the goals behind BAPCPA's creation of the applicable commitment period, it is irrelevant whether the debtor has a negative or zero disposable income. First, given that a debtor's circumstances change over time, unsecured creditors have the ability to continuously review a debtor's

¹⁸⁷ See *In re Girodes*, 350 B.R. 31, 35–36 n.4 (Bankr. M.D.N.C. 2006) (stating court disagrees with other courts that hold despite temporal determination of applicable commitment period debtor with no disposable income may exit a plan early, without paying allowed unsecured claim in full); see also *In re Alexander*, 344 B.R. 742, 751 (Bankr. D.N.C. 2006) (finding applicable commitment period is temporal requirement and holding requirement irrelevant in cases where debtors' Form B22C disposable income was zero or less).

¹⁸⁸ See *In re Brady*, 361 B.R. 765, 775 (Bankr. D.N.J. 2007) (noting debtors assert despite their applicable commitment period being five years, having zero projected disposable income renders applicable commitment period inapplicable); *Alexander*, 344 B.R. at 751 ("Because applicable commitment period is a term the statute makes relevant only with regard to the required payment of projected disposable income to unsecured creditors . . . it simply does not come into play where no projected disposable income must be taken into account."); *In re Davis* 348 B.R. 449, 451 (Bankr. E.D. Mich. 2006) (observing debtor's argument that applicable time commitment is irrelevant because she has zero income).

¹⁸⁹ *In re Frederickson*, 368 B.R. 825, 830 (Bankr. E.D. Ark. 2007), *aff'd*, 2007 Bankr. LEXIS 3151 (B.A.P. 8th Cir., Sept. 24, 2007) (noting that applicable commitment period is only relevant when debtor actually has "projected disposable income" to make future payments to unsecured creditors); *Brady*, 361 B.R. at 777 (holding debtor is not required to make plan payments to unsecured creditors because debtor has no disposable income); *Alexander*, 344 B.R. at 751 (observing debtor with no disposable income has no obligation to pay unsecured creditor).

¹⁹⁰ *Frederickson*, 368 B.R. at 830 ("[I]t is incongruous to require [debtor] to commit that amount—zero—for a specific period of time in order to be eligible to propose a confirmable chapter 13 plan."); *Alexander*, 344 B.R. at 751 (observing there is no reason to extend plans if there is no requirement to pay unsecured creditors); see *Brady*, 361 B.R. at 777 (agreeing with *Alexander* that debtor should not be forced to remain in plan, where debtor has no required payments to make to unsecured creditors).

¹⁹¹ See *Brady*, 361 B.R. at 775–77 (asserting when multiplying required commitment period by disposable income of zero, debtor's required payment is zero); *Don't Bury Chapter 13; 10 Reasons Why Chapter 13 is Still Better Than Chapter 7*, 16 CONSUMER BANKR. NEWS 1, 4 (November 2005) (suggesting if debtor's disposable income is zero, there is no required commitment period because when multiplying the period by zero, outcome is zero); see also *In re Beckerle*, 367 B.R. 718, 720 (Bankr. D. Kan. 2007) (stating where disposable income is zero, applying multiplicand formula of monetary approach would result in no applicable commitment period); Joseph A. Bledsoe, III, Barr, *Alexander and Revised Section 1325(b)*, 28 Disclosure Statement 1, 6 (North Carolina Bar Association) (September 2006) (noting where disposable income is zero, debtor is not subject to applicable commitment period).

expenses in order to capture a debtor's income if it increases.¹⁹² Additionally, using Form B22C¹⁹³ to determine a debtor's projected disposable income is merely a starting point and does not conclusively establish that a debtor has no ability to pay.¹⁹⁴ Form B22C is used to determine if debtor is subjected to the means test and thus while a below median income debtor is required to file a Form B22C, it is not determinative of a below median income debtor's projected disposable income.¹⁹⁵ As a result, a debtor may have available disposable income that is not exempt from the definition of projected disposable income, making it necessary for an unsecured creditor to be able to capture this income.¹⁹⁶ Moreover, according to the explicit language of the Bankruptcy Code it doesn't matter what a debtor's disposable income is; if a debtor does not provide for payment in full of all allowed unsecured claims, the applicable commitment period must be three or five years.¹⁹⁷ The statute provides no exception for when a debtor's projected disposable income is equal to zero and thus these debtor's are subjected to the applicable commitment period.¹⁹⁸

¹⁹² See *In re Davis*, 348 B.R. 449, 458 (Bankr. E.D. Mich. 2006) (stating purpose of debtors' submission of post-confirmation tax returns is to enable creditors to capture increases in post-petition income); Lynch, *supra* note 185, at 58 (observing unsecured creditors' will seek modification of plan payments because debtors' income will increase). See generally Hildebrand, *supra* note 18, at 55 (discussing modification as one method trustees' can use to seek higher payments throughout repayment period).

¹⁹³ OFFICIAL FORM 22C, CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME, http://www.usdoj.gov/ust/eo/bapcpa/defs/docs/samples/BK_Form_B22C_V2.pdf (last visited Nov. 5, 2007).

¹⁹⁴ *In re Fuller*, 346 B.R. 472, 483–84 (Bankr. D. Ill. 2006) (holding projected disposable income is based on more than disposable income as calculated in reference to average of debtor's income over six month period preceding petition date); *In re Jass*, 340 B.R. 411, 418 (Bankr. D. Utah 2006) (observing Form B22C is only starting point for determining projected disposable income); *In re Plumb*, 373 B.R. 429, 435 (Bankr. W.D. N.C. 2007) ("To shoehorn that financial reality into a static Form B22C would result in many cases in a required plan payment schedule that does not reflect the debtor's actual ability to pay their creditors."). A debtor's current monthly income is presumed to be representative of a debtor's projected disposable income absent a contrary showing. *In re Ward*, 359 B.R. 741, 744 (Bankr. D. Mo. 2007). Current monthly income is not considered conclusively representative of projected disposable income, because current monthly income is based on historical earnings while projected disposable income is a forward-looking concept. *Id.* Additionally, even if projected disposable income is found to be synonymous with the term disposable income, it would not be irrelevant to keep a debtor with zero disposable income in a chapter 13 plan because the same policy reasons still exist (i.e., an unsecured creditors ability to review a debtor's expenses for a period of time to capture any increase in available income and prevent abusive filings by the debtor).

¹⁹⁵ See *In re Daniel*, 359 B.R. 320, 326–27 (Bankr. D. Kan. 2006) (indicating Form B22C has no application for below median debtors); *Alexander*, 344 B.R. at 746 (suggesting court has greater flexibility in determining below median debtor's disposable income and Form B22C is just starting point); see also *In re Nevitt*, No. 05–77798, 2006 Bankr. LEXIS 1763, at *6–7 (Bankr. N.D. Ill. August 18, 2006) (stating for below median debtor Form B22C cannot be used to determine debtor's projected disposable income).

¹⁹⁶ *Nevitt*, 2006 Bankr. LEXIS 1763, at *7–10 (suggesting it is not inequitable for below median debtor to use different criteria to determine "amounts reasonably necessary to expand" because applicable commitment period for below median debtor is only three years).

¹⁹⁷ *In re Casey*, 356 B.R. 519, 527 (Bankr. D. Wash. 2006) (holding that debtor must fulfill three or five year applicable commitment period regardless of amount of disposable income); see *supra* Section IV.B (discussing section 1325's opt out clause).

¹⁹⁸ *In re Nance*, 371 B.R. 358, 371–72 (Bankr. S.D. Ill. 2007) (stating absent payment in full, no discharge may be granted in period less than applicable commitment period, even if debtor has zero disposable income); *In re Strickland*, No. 06–81060 C–13D, 2007 Bankr. LEXIS 508, at *2–3 (Bankr. D.N.C. Feb. 13,

As a result, chapter 13 debtors should not be able to avail themselves of the benefits of chapter 13 without committing to an ongoing obligation to unsecured creditors.¹⁹⁹ Despite a debtor's projected disposable income equaling zero, a debtor cannot exit a plan early without meeting the requirements set forth in section 1325(b)(4)(B).

While a temporal interpretation of the applicable commitment period has created a dichotomy between having and not having projected disposable income, under a monetary interpretation this issue would be moot.²⁰⁰ If the applicable commitment period is a multiplier, a debtor having zero projected disposable income has no obligation to unsecured creditors.²⁰¹ Although a monetary interpretation of the applicable commitment period would obviate the need to determine whether a debtor with zero projected disposable income is subjected to the applicable commitment period, a monetary interpretation ignores a fundamental tenet of chapter 13. A debtor, under chapter 13, must provide an ongoing obligation to unsecured creditors, even if it is merely the obligation to remain exposed to the potential of future payment, in the event of a favorable financial change.²⁰²

Given that the BAPCPA reforms focused on increasing the rights of unsecured creditors, it is consistent with these reforms to hold that the applicable commitment period is a temporal concept. The theme of the BAPCPA reforms underscores the importance of a minimum plan length. Congress would not create a new term that decreased an unsecured creditor's ability to capture a debtor's income while trying to prevent debtors from frequently filing for bankruptcy without paying off their unsecured debt. Therefore, the applicable commitment period can not be a multiplier that allows a debtor to exit chapter 13 without paying off the allowed unsecured claim in full or providing some ongoing commitment to repay their debt for a period of time.

2007) (noting there is no explicit exception in section 1325 exempting debtors with zero projected disposable income from applicable commitment period); *Casey*, 356 B.R. at 527 (observing that in determining length of repayment plan "[i]t is irrelevant whether the projected disposable income is zero or \$1,000 or some other amount").

¹⁹⁹ See generally *Nance*, 371 B.R. at 369 (noting principal element of chapter 13 is to require debtor to make an ongoing commitment to pay all of debtor's disposable income during debtor's commitment period); *Strickland*, 2007 Bankr. LEXIS 508, at *3 (indicating fundamental principal of chapter 13 is to provide creditors with an ongoing obligation by debtor so interested parties can review debtor's financial circumstances); *In re Slusher*, 359 B.R. 290, 304 (Bankr. D. Nev. 2007) (mentioning chapter 13 requires debtor to provide an ongoing commitment to interested parties).

²⁰⁰ *In re Swan*, 368 B.R. 12, 24 (Bankr. D. Cal. 2007) ("Construction of the phrase 'applicable commitment period' as a monetary requirement renders this distinction meaningless.").

²⁰¹ See *id.*

²⁰² See *supra* note 199.

V. MODIFYING A CONFIRMED PLAN

Recognizing that a debtor's circumstances change over time, the Bankruptcy Code provides for plan modifications under section 1329.²⁰³ A debtor, trustee or unsecured creditor can request that a specific provision of the plan be modified.²⁰⁴ Section 1329 exists as a necessary means to balance the interests of the debtor and unsecured creditors. It ensures that a debtor will receive the necessary support to emerge from bankruptcy fiscally improved, while protecting an unsecured creditor's ability to recoup part of their claim.²⁰⁵ As a result, understanding the role that modification has on a confirmed plan is critical to understanding the requirements for confirming a plan. A study of both section 1325(b) and section 1329 demonstrates that while Congress intended to require a debtor to commit to a fixed plan length at confirmation, the use of section 1329 conflicts with this intention.

The language of section 1329(c), by itself, indicates that the applicable commitment period is a temporal plan length.²⁰⁶ Section 1329(c) states "[a] plan modified under this section may not provide for payments *over a period that expires after* the applicable commitment period[.]"²⁰⁷ The words invoke a chronological division of time that ends at the same time as the applicable commitment period.²⁰⁸ Moreover, because the section's purpose is premised on the ability to change some aspect of the plan over the duration of a plan, the applicable commitment period, in context, must be read as a temporal limitation.²⁰⁹ To hold the applicable commitment period is monetary requirement, would eliminate the need

²⁰³ 11. U.S.C. § 1329 (2006) ("At any time after confirmation of the plan but 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 . . .").

²⁰⁴ See *In re Ewers*, 366 B.R. 139, 141–42 (Bankr. D. Nev. 2007) (noting Congress listed ways plan can be modified in section 1329); *In re Robert*, 366 B.R. 27, 31 (Bankr. D. Ark. 2007) (stating debtors have ability to change plan payment amounts); *Strickland*, 2007 Bankr. LEXIS 508, at *3 (expressing section 1329 sets requirements for an interested party to modify plan payment amounts).

²⁰⁵ See *In re Grady*, 343 B.R. 747, 751–53 (Bankr. N.D. Ga. 2006) (mentioning section 1329 gives debtors flexibility to complete their plan when unforeseen circumstances arise); see also David S. Cartee, Note, *Surrendering Collateral Under Section 1329: Can the Debtor Have Her Cake and Eat It Too?*, 12 BANKR. DEV. J. 501, 512 (1996) (mentioning section 1329 provides flexibility to debtors' reorganization plan); *Representing Consumers Under BAPCPA*, *supra* note 129, at 227 ("Without the availability of modification, the only solutions for a debtor's inability to complete a plan, even after three years, would be conversion, dismissal or, if possible, a hardship discharge.").

²⁰⁶ See 11 U.S.C. § 1329(c); see also *In re Kagenveama*, No. 05-28079-PHX-CGC, 2006 Bankr. LEXIS 2759, at *7–9 (Bankr. D. Ariz. July 10, 2006) (indicating section 1329 clearly references applicable commitment period as a temporal plan length).

²⁰⁷ 11 U.S.C. § 1329(c) (emphasis added).

²⁰⁸ *In re Dew*, 344 B.R. 655, 661 (Bankr. N.D. Ala. 2006) (suggesting, because section 1329 deals with extending duration of plan length, applicable commitment period must be period of time); see Lynch, *supra* note 185, at 57 ("Section 1329(c), dealing with the maximum length of modified plans, was amended to specifically provide that a plan modified under this section may not provide for extending payments over a period that expires after the applicable commitment period of §1325(b)(1)(B).").

²⁰⁹ See *Dew*, 344 B.R. at 661 ("Inasmuch as sections 1322(d)(2) and 1329(c) deal with extending the duration of a plan confirmed under section 1325, the only logical conclusion is that the applicable commitment period under section 1325(b)(4)(A) must be a period of time . . .").

for financial review and prevent parties from seeking modification because a debtor could exit the plan early without paying in full the allowed unsecured claims.²¹⁰

Assuming that the applicable commitment period sets a predetermined plan length, an issue arises on how to reconcile a debtor's right under section 1329 to change a plan length with the fixed plan length requirement under section 1325(b), without completely paying off all the allowed unsecured claims.²¹¹ The courts are split as to whether the requirements of section 1325(b) are incorporated into the modification requirements.²¹² If section 1325(b) is incorporated into section 1329, it would suggest that despite a change in circumstances the debtor is locked into a fixed plan length.²¹³ However, if section 1325(b) is not incorporated into section 1329, the modification provision provides the debtor with the ability to change the length of a plan while only setting a maximum limit on the length of time a modified plan can be extended.²¹⁴

Currently, the majority approach holds that section 1325(b) is not incorporated into the modification requirements.²¹⁵ This is because section 1325(b) is not among

²¹⁰ *In re Slusher*, 359 B.R. 290, 305 (Bankr. D. Nev. 2007) (suggesting under monetary interpretation debtor could use exempt assets to pay off plan, eliminating need for yearly review); *In re Davis*, 348 B.R. 449, 458 (Bankr. E.D. Mich. 2006) (noting monetary view is inconsistent with BAPCPA's addition of an ongoing reporting obligation); Becket & Lee, *supra* note 6, at 44 ("Accepting the position that the applicable commitment period is merely a monetary threshold that a debtor must meet calls into question two additional BAPCPA provisions.").

²¹¹ See Lynch, *supra* note 185, at 57 ("But the bigger issue was not addressed: how to reconcile a debtor's right to reduce the time of payments under §1329(a)(1) with the language of §1325(b) restricting plans from paying off early absent 100 percent payment to unsecured claims."); see also *A Year After BAPCPA*, *supra* note 20, at 28–29 (stating future litigation will confront whether despite a temporal connotation of applicable commitment period, debtor can modify plan by reducing plan length).

²¹² Compare *In re Strickland*, No. 06-81060 C-13D, 2007 Bankr. LEXIS 508, at *3 (Bankr. D.N.C. Feb. 13, 2007) (noting requirements of section 1325(b) must be applicable otherwise an interested party's ability to monitor debtor's ability to pay is severely undermined) with *In re Robert*, 366 B.R. 27, 31 (Bankr. D. Ark. 2007) (stating section 1329 does not expressly designate compliance with section 1325(b)). See *In re Schiffman*, 338 B.R. 422, 433 n.6 (Bankr. D. Or. 2006) (indicating a single position on incorporation is not universally accepted); *Representing Consumers Under BAPCPA*, *supra* note 129, at 227 (mentioning there has been some dispute as to whether section 1325(b) applies to modifications).

²¹³ *In re Keller*, 329 B.R. 697, 702–03 (Bankr. D. Cal. 2005) (explaining section 1325(b) applies to proposed modifications and thus plan length can not be shortened absent payment in full); *In re Guentert*, 206 B.R. 958, 961 (Bankr. D. Mo. 1997) (holding part of debtor's good faith requirement is to remain committed for full length of plan, absent repayment in full, and therefore Bankruptcy Code does not allow for modification of debtor's plan length); see David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 301 (2007) ("The minimum 'applicable commitment period' is established in section 1325(b). Therefore, modification becomes a means to subvert the commitment period.").

²¹⁴ See 11 U.S.C. § 1329(c) (2006) (indicating modified plan may not provide for payments extending over period longer than debtor's applicable commitment period); see also *Robert*, 366 B.R. at 34 (expressing absent clear congressional command, section 1329 does not require compliance with section 1325(b)); *Representing Consumers Under BAPCPA*, *supra* note 129, at 227 (mentioning five year requirement is not binding on proposed modifications to plan).

²¹⁵ See *Robert*, 366 B.R. at 32–34 (indicating despite BAPCPA changes, *Forbe's* conclusion that section 1325(b) is not consideration in post-confirmation modifications is still valid (citing *Forbes v. Forbes* (*In re Forbes*), 215 B.R. 183, 192 (B.A.P. 8th Cir. 1997))); *In re Ewers*, 366 B.R. 139, 142–43 (Bankr. D. Nev. 2007) (stating section 1325(b) is not incorporated into section 1329); see also *Representing Consumers*

the specifically referenced provisions in section 1329(b), which lists the required statutes that must be complied with for a modification to be effective.²¹⁶ Additionally, confirmation and post-confirmation are separate and distinct periods, each with their own set of rules.²¹⁷ A debtor's ability to shorten their plan after confirmation, as a result, weakens the temporal interpretation of the applicable commitment period. This is because it would be inconsistent to require the debtor, at confirmation, to remain exposed for a fix period of time to unsecured creditors, while being able to shorten this exposure period after confirmation. Modification of a debtor's plan length, therefore, undermines an unsecured creditor's ability to review a debtor's income and expenses to ensure that the debtor is putting forth his best efforts to repay.²¹⁸ Accordingly, although the language of section 1329(c) supports a temporal connotation for the applicable commitment period, the language and practice of section 1329(b) suggests otherwise.

CONCLUSION

The chapter 13 confirmation requirements were modified under the BAPCPA reforms to prevent debtors from using bankruptcy opportunistically. Congress created the applicable commitment period as a method to protect unsecured creditors by requiring the debtor to make a good faith effort to repay what the debtor can afford over a meaningful period. It would be incongruent with the BAPCPA reforms for the applicable commitment period to be used as a multiplicand in determining a minimum amount due. As a multiplier, the applicable commitment period can allow a debtor to exit a chapter 13 plan early and deprive unsecured creditors of the potential to capture increases in a debtor's income. Thus, the applicable commitment period must be viewed as a temporal concept, creating a fixed plan length. To hold otherwise, would go against the express language, intent, and goals of the BAPCPA legislation. The applicable commitment period,

Under BAPCPA, supra note 129, at 227 (suggesting despite some dispute, section 1329's language clearly indicates section 1325(b) is not incorporated into modification requirements).

²¹⁶ 11 U.S.C. § 1329(b) ("Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section."); *accord Ewers*, 366 B.R. at 142 (quoting *Sunahara v. Burchard* (*In re Sunahara*), 326 B.R. 768, 781 (B.A.P. 9th Cir. 2005)); *see Sunahara v. Burchard* (*In re Sunahara*), 326 B.R. 768, 781 (B.A.P. 9th Cir. 2005) ("Section 1329(b) expressly applies certain specific Code sections to plan modifications but does *not* apply § 1325(b). Period.") (emphasis in original); *see also Robert*, 366 B.R. at 31 ("Except for the reference to health insurance and the applicable commitment period, Section 1329 does not expressly designate compliance with any part of Section 1325(b) in a post-confirmation modification.").

²¹⁷ *In re Hanks*, 362 B.R. 494, 502 n.30 (Bankr. D. Utah 2007) ("What may or may not be permitted following confirmation of a plan is not instructive on what must be done at the actual confirmation hearing . . ."); *Ewers*, 366 B.R. at 142 ("Separate sections govern a debtor's plan at confirmation (§ 1325) and the post-confirmation plan when modified (§ 1329)."). Accordingly, it is doubtful that Congress intended the applicable commitment period to forever define the duration of a chapter 13 plan. *Ewers*, 366 B.R. at 143.

²¹⁸ Allowing the plan length to be shortened consequently would allow the debtor to avoid the confirmation limitations imposed by Congress to protect unsecured creditors (i.e. an ongoing obligation by the debtor to debtor's unsecured creditors). *See supra* note 199.

therefore, creates a bifurcated plan length in which above the median income debtors are subjected to a fixed five year plan length and below the median income debtors have a three year minimum plan length.

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