

Chap 7..13

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THE PRUDENT PRACTITIONER

The Plain Meanings of “Projected Disposable Income” and the “Applicable Commitment Period

By Rosemary E. Williams*

Every profession has coded words and phrases, used to convey complex but nonintuitive meanings within a few allusive words. Other phrases or words take on a meaning specific to the context which may contradict the meaning of the same word outside a specific discipline (example: discharge, generally meaning to fulfill an obligation, but in our field, meaning a release of personal liability). Courts writing opinions sometimes use the phrase “plain meaning” as...

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From the Editor

Take a look at the PDF editor offered in version 8.0. You will now be able to enter text onto completed PDF forms prior to filing or insert notes on them for future reference. This allows some modification of forms which may just need a slight change to comply with court requirements or some other preference to make them eligible for filing. Look for numerous, updated Chapter 13 plans, for those who have the Plan 13 module, as well as improvements to electronic filing and other program enhancements in upcoming 2009 releases.

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what? Defiance, a thrown gauntlet (a coded phrase in itself, that), exasperation at what seems to that jurisdiction to be an obvious interpretation, but one with which other jurisdictions interpret differently or find ambiguous?

Three circuit courts and one BAP have held forth in recent months on the proper meaning and application of the phrase “projected disposable income” as used in Code § 1325(b)(2), with its direct link with and impact on “applicable commitment period.” Although each jurisdiction cited the “plain language”¹ approach to interpretation, the four jurisdictions divide on the “plain meaning” of this Code section, with its obvious importance to Chapter 13 debtors, practitioners and trustees. In this issue, the Prudent Practitioner considers and contrasts these four decisions and their application to Chapter 13 practice.²

I. Kagenveama³ (Ninth Circuit)

The Court of Appeals for the Ninth Circuit brought the differing interpretations in lower courts to the fore in deciding whether “projected disposable income” means “disposable income,” as defined by § 1325(b)(2), projected over the “applicable commitment period” (called the “mechanistic” approach by other circuits) or whether that phrase connotes a forward-looking concept that only uses the “disposable income” calculation as a starting point and permits courts to consider other factors (sometimes called the “forward-looking” approach).

Kagenveama argued the mechanistic approach, noting that the term “disposable income,” as used in § 1325(b)(1)(B), is specifically defined in § 1325(b)(2). In this view, the word “projected” is an adjective modifying “disposable income,” and thus the proper interpretation requires no more than a simple

multiplication of “disposable income” paid out over the “applicable commitment period.” In opposition, the trustee focused on the time-linked meaning of the word “projected” in arguing that “projected” made “disposable income” a forward-looking concept which authorized a court to depart from the statutory definition of “disposable income” in § 1325(b)(2) and consider other evidence to derive “projected disposable income.”

Comment: The key difference between these views is time: whether disposable income was measured once and for all at a single point in time for purposes of the applicable commitment period, or whether it included future income and could fluctuate over time.⁴

The trustee argued that “applicable commitment period” mandated a temporal measurement, in that the phrase denoted the time by which a debtor was obligated to pay unsecured creditors. Kagenveama argued that the phrase only mandated a monetary multiplier, i.e., it was merely useful in calculating the total amount to be repaid by a debtor. Based on the “plain language” of the Code, the Circuit Court concluded that the trustee’s interpretation was correct, but that the “applicable commitment period” requirement is inapplicable to a plan submitted voluntarily by a debtor with no “projected disposable income.”

The Ninth Circuit faulted the trustee’s position as rendering the definition of “disposable income” found in § 1325(b)(2) into “surplusage.” In this Court’s view, there could be no reason for § 1325(b)(2) to exist other than to define the term “disposable income” as used in § 1325(b)(1)(B). The plain meaning of the word “projected,” in and of itself, did not provide

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a basis for including other data in the calculation because “projected” was simply a modifier of the defined term “disposable income.” Therefore, to give meaning to every word of § 1325(b), “disposable income,” as defined in § 1325(b)(2), had to be “projected” in order to derive “projected disposable income.” Further, the Ninth Circuit held that there was nothing in the Bankruptcy Code that required that all plans be held open for the “applicable commitment period.” The Court noted that § 1325(b)(4) did not contain a freestanding plan length requirement; rather, its exclusive purpose was to define “applicable commitment period” for purposes of the § 1325(b)(1)(B) calculation.⁵

II. Lanning⁶ (Tenth Circuit)

Lanning had accepted a buyout on her job within the six-month prepetition period. At the time of her bankruptcy case, Lanning’s actual disposable income after expenses shown on Schedules I and J was \$149 monthly; however, her average disposable income within the six-month period shown on B22C was \$1,114.98. The trustee objected to a proposed 36-month payout and insisted on the higher figure, “despite acknowledging that Ms. Lanning did not have the means to fund such a plan.”

The issue before the Court of Appeals for the Tenth Circuit was therefore whether the “projected disposable income” referred to in § 1325(b)(1)(B) was to be calculated by the mechanical use of the definitions of “disposable income” and “current monthly income” set forth in §§ 1325(b)(2) and 101(10A)(A)(i), respectively, or whether it was permissible to adjust the “monthly disposable income” calculated on Form B22C to account for a debtor’s actual ability, shown on Schedules I and J, to fund a plan as of the effective date of the plan (the “forward-looking” interpretation). After reviewing existing case law, including *Kagenveama*, the Court of Appeals adopted the “forward-looking” approach.

Comment: In this Court’s refreshingly open explanation of its rationale, the difficulty with adopting the forward-looking approach was that “it renders the new definition of ‘disposable income,’ with its

link to historic ‘current monthly income,’ nearly meaningless unless one reads a presumption into the statute—that the defined term “disposable income” is just the starting point—which can be rebutted by showing a substantial change in circumstances bearing on how much the debtor realistically can commit to repayment of unsecured creditors as of the effective date of the plan.” The Court admitted that its approach “requires a certain disregard of the notion that Congress knows how to create a presumption when it intends one.”

Coming to the core of its rationale, the Court of Appeals noted that the mechanical approach adopted by the Ninth Circuit would effectively foreclose bankruptcy protection to debtors like Lanning, who lack adequate income going into the commitment period to pay the amount of disposable income on Form B22C, while at the same time permitting above-median debtors who have greater income at the time of plan confirmation to pay less to unsecured creditors than they are able. While the latter situation could be rectified by post-confirmation modification of the plan under 11 U.S.C. § 1329, the former situation could not be addressed in that manner because the plan would be infeasible and therefore unconfirmable in the first place. Thus practicality won over statutory language in this holding.

III. Frederickson⁷ (Eighth Circuit)

When calculated on B22C, Frederickson’s disposable income was a negative amount. Because of this, the Court of Appeals for the Eighth Circuit agreed that Frederickson had no “projected disposable income.” However, Frederickson’s Schedules I and J showed an actual monthly net income of \$606. The trustee objected to confirmation of Frederickson’s 48-month plan, arguing that, because the plan would not result in a 100% distribution to creditors Frederickson was required to propose a plan of at least 60 months. The debtor responded that he did not have any projected disposable income, and thus had no obligation to remain in bankruptcy for an extra year.

The Court of Appeals joined the Tenth Circuit in adopting the forward-looking test rejected by

the Ninth Circuit, holding that, while a debtor's historically-based "disposable income" was the starting point for determining "projected disposable income," the final calculation could take into consideration changes that have occurred in the debtor's financial circumstances, as well as the debtor's actual income and expenses as reported on Schedules I and J. Consistent with this view, the Court held that the "applicable commitment period" was a temporal concept which prevented above-median-income Chapter 13 debtors from confirming plans of less than 60 months, even though their "disposable income," as calculated using the "means test," was a negative number.

Recognizing the link between the meaning and application of the phrases "projected disposable income" and "applicable commitment period," the Court of Appeals considered how the statute should be interpreted. The Court noted that neither the mechanistic view or the forward-looking interpretation fits neatly into the structure of Code. § 1325(b) and simultaneously complies with the overarching purpose of BAPCPA. The Court perceived that "the clear congressional intent of BAPCPA" was to ensure that debtors repay creditors the maximum they can afford.

The Court of Appeals explained its departure from the Ninth Circuit's holding, acknowledging that the mechanical calculation espoused by the Ninth Circuit works if the debtor has a positive "disposable income." But if the debtor's "disposable income" is negative, despite the fact that the debtor could afford to make payments to unsecured creditors, it is necessary to determine whether the "applicable commitment period" is a temporal requirement or a monetary requirement.

The Court acknowledged that this problem arises because "disposable income" is based upon a debtor's historical income and IRS tables that provide regional averages for common expenses. While this calculation may lead to an accurate projection of a debtor's "projected disposable income," it is not necessarily an accurate projection for many Chapter 13 debtors. Thus, a distinction can be drawn between a debtor's

"disposable income," which is calculated solely on the basis of historical numbers and regional averages, and a debtor's "projected disposable income," which necessarily contemplates a forward-looking number.

Under this interpretation, the Court recognized that bankruptcy courts would have some discretion over the calculations of each individual debtor's financial situation, but believed that the result would be that the debtor's "projected disposable income" would more closely align with reality. The circuit court believed this interpretation also comported with what it perceived to be Congress' intent that debtors who could pay more would be compelled to do so. Accordingly, the Court of Appeals adopted the view that a debtor's "disposable income" calculation on B22C was a starting point for determining the debtor's "projected disposable income," but that the final calculation could take into consideration changes that have occurred in the debtor's financial circumstances, as well as the debtor's actual income and expenses as reported on Schedules I and J.

Comment: This broad ruling on a major issue is based upon a relatively narrow factual base and includes an acknowledgement that the mechanistic view works well whenever the debtor has a positive projected disposable income. However, it may be hazardous to view this decision as one limited to that narrow set of facts since there is nothing in the decision so limiting the impact of the holding, and the overall tone is that of a holding applicable to all cases.

IV. Thomas⁸ Sixth Circuit BAP

The Chapter 13 trustee objected to confirmation of several above-median-income debtors' proposed plans as not satisfying the "projected disposable income" requirement. In particular, trustee objected to the debtors' calculation of their "disposable income" as including secured debt deductions for collateral that they intended to surrender. The Bankruptcy Appellate Panel held that the "means test" was a mechanical, formulaic test, that is applied no differently in Chapter 7, to determine whether case is presumptively subject

to being dismissed, than it is in Chapter 13 in calculating debtor's disposable income. In calculating their "disposable income," debtors were entitled to deduct payments that they were contractually obligated to make on the petition date on their secured debt, even though the debtors intended to surrender the collateral securing this indebtedness; but... Chapter 13 debtors' "disposable income" was not necessarily their "projected disposable income."

The BAP held that in calculating "projected disposable income" the bankruptcy courts had to consider changes not only in debtors' income, but in their expenses as well, as evidenced by their schedules or other credible proof. In this holding, the BAP joined the Tenth and Eighth Circuits in adopting the "forward-looking" approach.

Given the existing division among the circuits on this important issue, what does the Prudent Practitioner do?

- 1) First the obvious—know the existing approach in the relevant jurisdiction.
- 2) If there is no definitive authority in the jurisdiction on this important issue, take the approach most appropriate to the client's facts, but be aware that use of the mechanical approach outside of the Ninth Circuit is likely to produce an objection.
- 3) If an objection is possible, approach the case trustee to gain some idea of the likelihood of an objection to confirmation.
- 4) If an objection is likely, budget for the expense of appeals to the circuit level, or at least to the circuit's BAP. If the cost of the appeal exceeds

the debtor's resources, it may be necessary to adopt an alternative plan arrangement.

NOTES

1. After citing the plain language rule in its Lanning decision discussed in this column, the Court of Appeals for the Tenth Circuit described the judicial quandary: "Here, the statutory language [of Code § 1325(b)(2)] may be plain, but it is unclear in its meaning."
2. 11 U.S.C.A. § 1325(b)(2). These and other judicial interpretations are made necessary because of yet another drafting lapse in BAPCPA: the phrase "projected disposable income" is not a defined term in the Bankruptcy Code, although "disposable income" is.
3. *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008).
4. Disposable income is defined as "current monthly income received by the debtor ... less amounts reasonably necessary to be expended..." 11 U.S.C. § 1325(b)(2). Current monthly income is defined as "the average monthly income from all sources that the debtor receives" during the 6-month period preceding the commencement of the case or a date upon which the current income is determined by the court. 11 U.S.C. § 101(10A)(A). FRBP 1007(b)(6) requires a debtor to file a statement of current monthly income on Form B22C. Section 1325(b)(3) requires that if a debtor's annualized current monthly income is greater than the median family income of similarly-sized households, then "amounts reasonably necessary to be expended" are determined in accordance with Code § 707(b)(2).
5. Subsection (b)(4) states "For purposes of this subsection, the 'applicable commitment period' ... shall be ... not less than 5 years" for above-median debtors. Subsection (b)(1)(B) states that "the debtor's 'projected disposable income' to be received in the 'applicable commitment period' ... will be applied to make payments under the plan." When read together, the Court interpreted the provision as meaning that only "projected disposable income" had to be paid out over the "applicable commitment period." Therefore, when there was no "projected disposable income," there was no "applicable commitment period."
6. *In re Lanning*, 2008 WL 4879134 (10th Cir. 2008).
7. *In re Frederickson*, 545 F.3d 652 (8th Cir. 2008).
8. *In re Thomas*, 395 B.R. 914 (B.A.P. 6th Cir. 2008).

California § 703 Exemptions Unconstitutional?

We have received reports that some trustees are beginning to challenge the constitutionality of California's § 703 exemptions statute. For more details and arguments for and against this position see the Arizona decision ruling California's law is unconstitutional (*In re Regevig*, 389 B.R. 736 (Bankr. D. Ariz. 2008)), decided on June 24th, and *In re Morrell*, 394 B.R. 405 (Bankr. N.D. W. Va. 2008)), ruling West Virginia's similar statute as constitutional, decided on August 14th. See footnote 5 of the Morrell case for other cases which have ruled on this issue.

Chap 7..13 Tips

Means Test Data

Ever wonder how you can view National and Local Standards short of opening up a Chapter 7 Means Test or Chapter 13 Statement of Disposable Income? Easy enough, just click on Means Test menu in Chap 7...13 and select Means Test Data. Here you will find information on Median Income based on Household Size, Housing Expenses based on the Debtor's County, Regional Transportation Expenses, Living Expenses, Expense Multipliers and the IRS Census Transportation Region for each county in the U.S. You can always go to the U.S. Trustee's website at www.usdoj.gov/ust/ to get these standards. but they are also available inside your bankruptcy software.

Need a New Chap 7..13 Workspace?

Is Chap 7..13 acting a bit sluggish for you at times? One thing that can cause this is keeping all of your cases on one workspace. Perhaps it's time to create a new workspace. And how do you do that? In the upper left hand corner of your screen, on the toolbar, you'll see an icon that looks like a blank page. Just click once on it, and it will bring up the Create New Workspace Window. Here, you can name your new workspace and save it wherever you would like on your hard drive by clicking on the down arrow next to the "Look in" field.

Once you've done that, click on the "Create New" button, and you'll get a confirmation message saying that the workspace has been created successfully, and asking if you would like to import the current settings to the new workspace. Click "yes" if you are satisfied with your settings or "no" if you want to change your settings. The program will then check for new forms and update the forms automatically and bring you to the Choose Default District for Workspace Window. Scroll down to the district you want, then click on "Use." This will bring you to the familiar Case List Window, where you can click on "New" to open a new case. And now you're on your way with a fast-moving new workspace!

Filing Locations and Office Codes

Don't know where to file? Looking for Office Codes? Chap7..13 software uses the county that you enter in Case Information to electronically file your documents, and automatically selects the appropriate division of the bankruptcy court.

There are some counties that have more than one division accepting filings. The office codes in the Chap7..13 software are regularly updated to limit the need to manually input this code, but there are exceptions. It may not be possible for the Chap7..13 software to choose the correct division without your help. In these situations you must know the proper office code of the courthouse where you wish to file. You will need to input the office code on the Electronic Case Filing Window/Court Website tab when you select the county in which you are filing the case.

Examples of districts with this issue are the District of Minnesota and the Central District of California. In Minnesota, a client living in Stearns county has the option to file his bankruptcy at either the Fergus Falls Division or the Minneapolis Division. See http://www.mnb.uscourts.gov/Newsite/Judge_Office/minneapolis.html. Similarly, a client living in Benton, Kanabec, Mille Lacs, Morrison or Pine counties may file with either the Duluth Division or the St. Paul Division. See http://www.mnb.uscourts.gov/Newsite/Judge_Office/duluth.html.

In the Central District of California, there are two divisions located in Los Angeles County; depending on where the client lives, he or she may be required to electronically file to the Los Angeles Division or

the San Fernando Valley Division. If your client lives in Ventura County he or she may be required to file in the San Fernando Valley Division or the Northern Division. See <http://www.cacb.uscourts.gov/>

What Does the Calculator Button on Line 3 of the Means Test Do?

If you click on the calculator button next to the Debtor’s Income/Spouse’s Income box on the means test (or anyplace this calculator icon appears), you will find a place to store the income figures for your client. Chap 7 . . 13 will add them together and average those numbers for you to get the average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case.

You can use the “Clear All” field to reset the calculator (and all text).

You can use the “Load Template” field to add this template into the calculator if it is not already there. Alternatively you can delete the lines containing the formula and manually enter any formula you want.

You can use “Copy to Clipboard” to effectively “copy” the data into the clipboard. You can then paste it into another application as text.

You can use “Edit in Notepad” to create a Wordpad version of your entries.

The “Convert Cell” feature, which will eventually allow you to convert weekly income into monthly income into six month averaged income, is not yet functional, but is an upcoming feature of the program.



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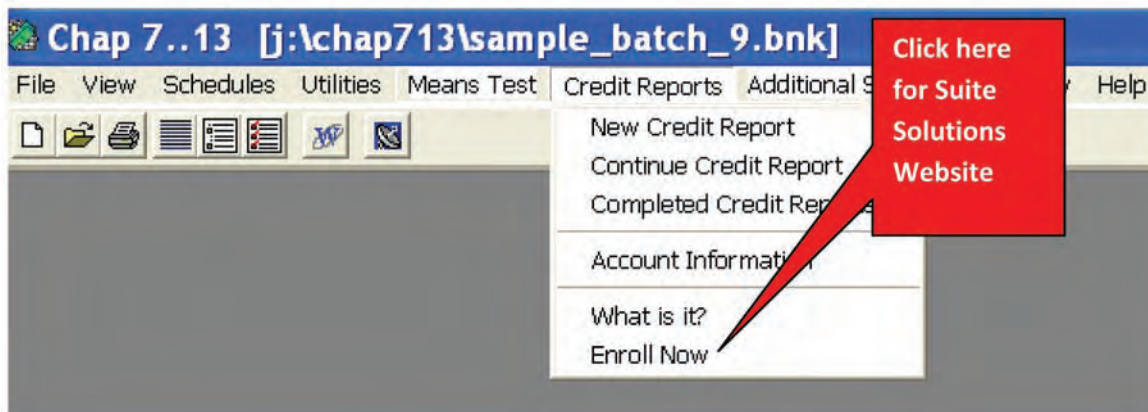
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Recent Releases

The Census Bureau and the Administrative Office of the Department of the Judiciary have kept us busy these past few months with updates to the median family income figures and the implementation of CM/ECF Version 3.2, contained in our Version 7.8 release, and several new or revised official forms, included in Version 7.9. Version 7.8 also contains office code and exemption updates.

By the time this issue goes to press, you will soon be receiving the Version 8.0 CD. We're very pleased to announce that our new CD includes some new tools which will facilitate more customization of pdfs and eliminate many of the issues bankruptcy attorneys may encounter with their local courts regarding form content. Most importantly, Chap7..13 now has an integrated PDF viewer called the PDF-XChange Viewer. This easy-to-use viewer lets you edit your PDF documents by adding notes, text boxes, arrows, shapes, callouts and even "rubber stamps" such as "Draft" and "For Comment." It also has a typewriter

tool, enabling you to add text that is not within a text box. We think you will really enjoy this new feature. However, if you don't like change and are really fond of Adobe, don't despair. It's still there. You just have to choose it as an option under User Preferences, although Adobe Reader does not give you the editing capabilities of the PDF XChange Viewer.

Separate from the PDF-XChange Viewer, our 8.0 CD also features two new form fields which we think will be very helpful. First is an editable text field just above the title of almost all of our forms which will enable you to type the words "Amended," or First Amended," "Second Amended," etc., and to add a date as well, according to the requirements of your court's local rules. Next, we've improved the attorney's signature block on all forms that require an attorney's signature and do not already provide the information contained in the signature block. It consists of the attorney's name and bar number, the firm name, address, telephone number, fax number and email address. Finally, our new CD contains fixes for various issues customers have been experiencing in connection with CM/ECF Version 3.2 and 3.3.

Many of the new features added in our CDs and in our web releases started as a suggestion from a customer. Please let us know what forms and enhancements you would like to see in the program by e-mailing us at west.chap7dotdot13@thomsonreuters.com.



We Want to Hear From You!

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