

I N S I D E T H E M I N D S

Best Practices for Filing Chapter 13

*Leading Lawyers on Counseling the Client,
Interpreting New Legislation, and
Communicating with Creditors*



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Practice, Procedure, Protocol,
and Problems in Chapter 13
Filings: Balancing Consumer
Protection and Abuse
Prevention

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Recent Trends in Bankruptcy Law

Bankruptcy filings peaked in October 2005 shortly before the effective date of the Bankruptcy Abuse Prevention Consumer Protection Act (BAPCPA). The United States Courts report that 2,078,415 bankruptcy cases of all chapters were filed in 2005.¹ Of these, about 1,660,000 were Chapter 7 cases and 412,000 were Chapter 13 cases.² After this spike, bankruptcy cases declined 70 percent to 617,660 in 2006. BAPCPA seemed to be having the effect of reducing Chapter 7 cases and increasing Chapter 13 cases. In 2006, 361,000 Chapter 7 cases were filed compared to 251,000 Chapter 13 cases.³ By 2007, bankruptcy filings started to trend up, with 850,912 filings, an increase of 37.8 percent over the prior year.⁴ In 2007, there were about 520,000 Chapter 7 filings and about 325,000 Chapter 13 filings. As can be seen, the percentage of Chapter 7 cases compared to Chapter 13 cases has increased in 2007.

The most recent statistics are for the twelve-month period ending March 2008. Bankruptcy filings for that twelve-month period were higher than they were for the calendar year ending December 2007—901,000 filings in the current twelve-month period compared to 695,000 filings for the prior twelve-month period.⁵ For the most recent twelve-month period, 1.83 of 1,000 people filed Chapter 7 cases nationally and 1.09 of every 1,000 people filed Chapter 13 cases.⁶

We are seeing an increased number of consumer bankruptcy cases filed these days because of the difficult financial conditions in today's economy. Recent data prepared by the American Bankruptcy Institute shows that the continued increase in bankruptcy filings, even after BAPCPA, appears highly correlated to increases in consumer debt. As a result, the courts are being asked to deal with a larger volume of cases than was perhaps anticipated. One of the most important trends in the bankruptcy area pertains to the fact that the courts have recently been asked to interpret

¹ http://www.uscourts.gov/bnkrpctystats/bankrupt_f1table_dec2006.xls

² http://www.uscourts.gov/bnkrpctystats/bankrupt_f2table_dec2005.xls

³ http://www.uscourts.gov/bnkrpctystats/bankrupt_f2table_dec2006.xls

⁴ http://www.uscourts.gov/Press_Releases/2008/bankrupt_newstat_f1table_dec2007.xls

⁵ http://www.uscourts.gov/Press_Releases/2008/bankrupt_newstat_f1table_mar2008.xls

⁶ http://www.uscourts.gov/Press_Releases/2008/Per_Capita_Filings_3-31-2008.xls

these cases in accordance with the plain language of the Bankruptcy Statute—which is not very clear; consequently, there is currently a great deal of conflict in the area of consumer bankruptcy law.

Many judges have felt the need to express their frustration with BAPCPA. For example, one bankruptcy judge wrote:

“To call the act a ‘consumer protection’ act is the grossest of misnomers.... Those responsible for the passing of [BAPCPA] did all in their power to avoid the proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law at distinguished universities, and many professional associations filled with the best of the bankruptcy lawyers in the country as to the perceived flaws in the Act. This is because the parties pushing the passage of the Act had their own agenda. It was apparently an agenda to make more money off the backs of the consumers in this country.... It should be obvious to the reader at this point how truly concerned Congress is for the individual consumers of this country. Apparently, it is not the individual consumers of this country that make the donations to the members of Congress that allow them to be elected and re-elected and re-elected and re-elected.” *In re Sosa*, [336 B.R. 113](#) (Bankr. W.D. Tex. 2005) (Monroe, J.).

The text is not always clear. Sometimes the text is so unclear that the judges have felt they had to deviate from the text in order to achieve what Congress intended.

“After reading the several hundred pages of text in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “Reform Act”), one conclusion is inescapable. The new law is not a model of clarity. Implementing the changes will present a daunting challenge to judges, clerk’s offices, attorneys and the parties who seek relief in the bankruptcy court after October 17, 2005, the date most of the provisions become effective. The plain meaning of the statute will be rebutted when a contrary legislative intent is clearly expressed. In such cases, the intention of the drafters, rather than the strict language, controls.” *In re Kaplan*, [331 B.R. 483](#) (Bankr. S.D. Fla. 2005) (Mark, J.).

Judge Mark's approach has not been universally followed by bankruptcy courts. This is because of the textual approach to judicial interpretation that has been espoused by the Supreme Court, particularly in bankruptcy related cases. Thus, in *United States v. Ron Pair Enterprises*, 489 U.S. 235 (1989), the Court stated:

The task of resolving the dispute over the meaning of §506(b) begins where all such inquiries must begin: with the language of the statute itself. *Landreth Timber Co. v. Landreth*, [471 U. S. 681](#), 685 (1985). In this case, it is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, [242 U. S. 470](#), 485 (1917). The language before us expresses Congress' intent—that post-petition interest be available—with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary.

The Supreme Court since 1989 has been less likely to deviate from its interpretation of the text itself in order to infer the intent of Congress. "The starting point in discerning congressional intent is the existing statutory text and not the predecessor statutes." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citations omitted). "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Id.* (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

Yet another key trend in this area is closer scrutiny of creditors' claims; it used to be that the validity of creditors' claims was accepted at face value, but that belief is now being challenged in many places. As stated by Federal Reserve Chairman Bernanke in May 2008,

The volume of mortgage defaults has led to well documented increases in mortgage foreclosures nationwide. About one quarter of subprime adjustable-rate mortgages are currently 90 days or more delinquent or in foreclosure.¹ Delinquency rates also have increased in the prime and near-prime segments of the mortgage market, although not nearly so much as in the subprime sector. As a consequence of rising delinquencies, foreclosure proceedings were initiated on some

1.5 million U.S. homes during 2007, up 53 percent from 2006, and the rate of foreclosure starts looks likely to be yet higher in 2008.⁷

Debtors are pushing back against foreclosure cases, particularly in bankruptcy courts. We have observed some major issues in the area of mortgage servicing. For example, Countrywide is being accused of making false statements as to the amount of the default or extent of the arrearages because they do not have accounting systems that respond to the particular nature of bankruptcy cases. In Pittsburgh, it appeared that Countrywide did not apply Chapter 13 payments properly to the loans and even fabricated correspondence in order to support their position.⁸ Most debtors do not have the wherewithal to be able to challenge those statements, and therefore the courts are now challenging these mortgage services.

Difficulties in Statutory Interpretation

Difficulties in statutory interpretation are an especially important trend in the bankruptcy area. Some people believed that they could determine the intent of Congress in passing the recent statute, based upon comments that were made by the people who worked to get the law passed. Todd Zywicki, a professor at George Mason Law School, then a visiting professor at Georgetown University, was perhaps the major academic proponent of BAPCPA. He stated in his testimony to the Senate Judiciary Committee:

It should also be stressed that means-testing will not prevent anyone from filing bankruptcy and receiving a bankruptcy discharge. Instead, it will simply condition the discharge for affected filers to pursuing a chapter 13 repayment plan rather than going into chapter 7. In fact, the means-testing rules will simply govern eligibility for chapter 7 relief; it has no impact on the confirmation of the debtor's chapter 13 plan. In approving the debtor's plan the court will still apply the budgetary processes provided for under current law without any consideration of the means-testing eligibility rules.

⁷ <http://www.federalreserve.gov/newsevents/speech/Bernanke20080505a.htm>

⁸ Stouffer, R. *Countrywide Mismanages Funds* PITTSBURGH TRIBUNE-REVIEW, January 10, 2008 http://www.pittsburghlive.com/x/pittsburghtrib/news/s_546743.html

The means-testing provisions also provide an excellent example of the Bill's incremental and balanced approach to the problem of abuse and fraud in the system. Under current law, it is already the case that the primary factor for courts to consider in deciding whether to dismiss a debtor's case for substantial abuse under §707(b) is whether the debtor can repay a substantial portion of his debts without significant hardship. Overwhelmed by the number of cases they confront and lacking the will to enforce its provisions consistently, however, it has been observed by one scholar that many perceive §707(b) to be a "dismal failure." Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105 (1998). *The Bill simply creates a more formal and reliable mechanism for implementing the goals that bankruptcy courts are already seeking to apply, but will do so in a way that is more efficient and fair than the current system.* See Edith H. Jones and Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BRIGHAM YOUNG UNIVERSITY L. REV. 177.⁹ (Emphasis added)

The point of the statute clearly was to promote a mechanical means of pushing more debtors into Chapter 13. The point of the statute was to make a determination of "substantial abuse" under former Bankruptcy Code section 707(b) unnecessary and instead create a reliable, mechanical "means test" to determine whether the "presumption of abuse" to be raised when a bankruptcy filer with above-median income files a Chapter 7 case has been sufficiently rebutted to permit such a filing.

At the time of the passage of BAPCPA in Congress, Senator Feingold inquired of Professor Zywicki if any changes were needed in the draft bill considering that the bill was about to be marked up in committee. This famous colloquy followed:

SENATOR FEINGOLD: What about my question? Are there any changes to the bill that need to be made at all or is it exactly the way it should be? We are marking this thing up next week. This is it. The train is leaving the station, apparently, and there

⁹ http://judiciary.senate.gov/hearings/testimony.cfm?id=1381&wit_id=3997

is not going to be another bankruptcy bill probably for a very long time. This is it. Should this bill be changed?

MR. ZYWICKI: I believe this bill is fine as it is.

SENATOR FEINGOLD: Not one word?

MR. ZYWICKI: There is no word that I would change in this particular piece of legislation.

However, when one actually reads and applies BAPCPA, provisions that were thought by the drafters to be unambiguous and clear have been found to be ambiguous in many ways and the courts are now grappling with that situation.

The “Hanging Paragraph”—Can a Secured Creditor be Forced to “Eat Steel”?

There has been much debate about how to treat automobiles that have been owned for more than 910 days. Some courts have treated a hanging paragraph in the Bankruptcy Code as giving the debtor the right to give the car back in satisfaction of their debt; and some courts have ruled that if you give the car back you have to pay the deficiency of what the car is worth and the amount of the debt. As the Seventh Circuit Court of Appeals framed the issue in *Wright v. Santander Consumer USA Inc.*¹⁰

Bankruptcy judges across the nation have divided over the effect of the unnumbered hanging paragraph that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added to §1325(a) of the Bankruptcy Code, 11 U.S.C. §1325(a). Section 1325, part of Chapter 13, specifies the circumstances under which a consumer’s plan of repayment can be confirmed. The hanging paragraph says that, for the purpose of a Chapter 13 plan, §506 of the Code, 11 U.S.C. §506, does not apply to certain secured loans.

The Court adopted the minority view, which holds that upon surrender of the vehicle to the secured creditor, the secured creditor nevertheless retains an unsecured claim for the deficiency. In so doing, the Seventh Circuit

¹⁰ *Wright v. Santander Consumer USA (In re Wright)*, — F.3d —, 2007 WL 1892502, 7th Cir.(Ill.), Jul 03, 2007 (NO. 07-1483).

rejected the “majority view” of bankruptcy courts holding that on surrender of the vehicle to the secured creditor, the “hanging paragraph” varied state law on deficiency claims by providing that such surrender would be in full satisfaction of the secured creditors’ claim. Here, the court ignored the “plain language” of BAPCPA and held that state law remedies continued to prevail anyway. The court held that the purpose of the act of “Restoring the Foundation of Secured Credit” would be subverted by the debtor’s “bold reading” of the “hanging paragraph” of Bankruptcy Code section 506.¹¹

IRA Withdrawals—Income for Means Testing?

Another debate centers on whether payments that debtors receive as withdrawals from their individual retirement accounts (IRAs) should be treated as current monthly income for the purposes of the means test, a formula applied to determine whether the consumer should have enough money available to make some minimal payment to creditors in a Chapter 13 bankruptcy plan. In other words, if you take money out of an IRA, should it be considered as recurring income during the course of the bankruptcy plan? There has been a split of authority on this question, with some courts saying “yes,” while others say “no.”¹²

Ownership Expenses—Can a Debtor Claim Them for a Vehicle Owned Free and Clear?

There has also been considerable debate with respect to whether or not operating expenses for an auto are available to someone who does not have a loan on their car. The United State Trustee Program’s position is that one should only be able to take those expenses if you are borrowing money to pay for the car, but the plain language of the statute can also be interpreted to mean that you can take those expenses irrespective of whether you are

¹¹ The Seventh Circuit recognized the “majority position” espoused by courts such as *In re Payne*, 347 B.R. 278 (Bankr. S.D. Ohio 2006); *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006); *In re Kenney*, 2007 Bankr. LEXIS 1646 at *16-17 (Bankr. E.D. Va. May 11, 2007) (collecting cases).

¹² A full analysis of this issue is contained in McNeilly, Jr., J. and Leibowitz, D., *Withdrawals from Tax-deferred Retirement Accounts: Included in Current Monthly Income?* Vol XXVII, No. 5 AMERICAN BANKRUPTCY INSTITUTE JOURNAL 14 (June, 2008) a copy of which might be found at <http://www.lakelaw.com/files/June2008Journal-updated.pdf>.

borrowing money to pay for the car—and that interpretation could make the difference between whether a debtor should be in Chapter 13 or not. There is a diametric split of authority on that interpretation—half the courts are saying one thing, and the other half are saying another.

Some courts have adapted the analysis of *In Re Ferrar-Johnson*, 353 B.R.224 (Bankr.N.D.Ill.2006), in support of the notion that Congress intended the word “applicable” to connote an allowance rather than a cap. In *Ferrar-Johnson*, the court noted that the term “applicable” read in isolation is indeed ambiguous. However, taken in conjunction with the entire statute, there was clearly a reason behind Congress’ distinction between “applicable monthly expense amounts” under the National and Local standards and the debtor’s “actual monthly expense amounts.” Had Congress intended for the vehicle ownership expense to be an actual expense deduction, it could have very well done so rather than draw a distinction between “applicable” and “actual” expenses.¹³ Generally, the line of reasoning in these cases leads to the conclusion that “by using two different terms Congress intended to ‘achieve two different results.’” See *In re Chamberlain*, 369 B.R. 519, 524-25 (Bankr.D.Ariz.2007).

While bankruptcy courts have come down with decisions across the board, there are some Bankruptcy Appellate Panel decisions that attempt to shed some light on the issue. In *In re Ransom*, 380 B.R. 799, 9th Cir.BAP (Nov. 2007), the BAP affirmed the bankruptcy court decision that the ownership expense is a cap on actual expense based on the ordinary meaning of the word “applicable.” The *Ransom* court interpreted “applicable” to mean “capable of or suitable for being applied” and therefore concluded that an ownership deduction was not capable of being applied when there was no actual expense. The eighth circuit Bankruptcy Appellate Panel reached a similar decision in *In Re Wilson*, 383 B.R. 729, 8th Cir.BAP (Ark. 2008)¹⁴. As recently as June 12, 2008, the Sixth Circuit Bankruptcy Appellate Panel arrived at a diametrically opposite result affirming the bankruptcy court’s decision allowing an ownership expense as an allowance in *In Re Kimbro*, 389

¹³ See *In re Fowler*, 349 B.R. 414, 418 (Bankr.D.Del.2006); *In re Demonica*, 345 B.R. 895, 902 (Bankr.N.D.Ill.2006); *In re Enright*, No. 06-10747, 2007 WL 748432 at *5 (Bankr.M.D.N.C. March 6, 2007).

¹⁴ *But see In re Egbert*, 384 B.R. 818, 828+ (Bankr.E.D.Ark. Apr 10, 2008) (Declining to follow *Kimbro*).

B.R. 518, 6th Cir.BAP (Tenn. 2008). The *Kimbro* panel reiterated that §707(b) did not incorporate or even refer to the IRM as a part of the means test thereby rebutting the Chapter 13 trustee’s argument that the IRS only allows deductions for actual expenses. The *Kimbro* panel also noted that ownership expenses are not necessarily limited to the cost of leasing or financing a vehicle. There may be expenses related to taxes and insurance that every vehicle-owning debtor incurs irrespective of whether the vehicle is owned free and clear. Providing a standard deduction to all debtors who own vehicles is in keeping with Congress’ decision “to give a higher priority to expediency and uniformity than to accuracy.”

In *Ross-Tousey v. Neary*, 2008 WL 5234070 (7th Cir. Dec. 17, 2008), the court held that a debtor could claim a vehicle ownership expense even if he owned the vehicle fee and clear.

Applicable Commitment Period—Does it Describe Time or Money?

Debtors, Chapter 13 trustees, and courts around the country are wrestling with whether “projected” disposable income is different than disposable income on the B22C form, and whether “applicable commitment period” is a time period or a multiplier of the monthly payment “of projected disposable income” under BAPCPA. But once these issues are resolved at the confirmation stage, they are both likely to reappear in altered forms in post-confirmation modification motions under §1329 of the Bankruptcy Code. Not only will the projected disposable income issue persist when a debtor’s income increases or decreases during the life of the plan, but because BAPCPA arguably requires above-median income debtors to remain in a plan for as long as sixty months under §1325(b)(4), debtors are considering whether Bankruptcy Code §1329 might be used to shorten the length of their plans.¹⁵

The Eighth Circuit Bankruptcy Appellate Panel explored this issue in depth in *Coop v. Fredericksen (In re Fredericksen)*, 375 B.R. 829 (8th Cir. BAP 2007), stating:

The phrase “projected disposable income” is not a new term. It was in 11U.S.C. § 1325(b)(1)(B) prior to BAPCPA

¹⁵ Lynch, B. Chapter 13 Plan Modifications: The Next BAPCPA Battleground, American Bankruptcy Institute – Consumer Corner <http://www.abiworld.org/AM/Template.cfm?Section=Home&CONTENTID=44474&TEMPLATE=/CM/ContentDisplay.cfm>

and was interpreted to mean the disposable income determined by subtracting “reasonable” expenses from Schedule J, or from the determination by the court, from the actual income of the debtor and projected, or applied, over the life of the plan. 11 U.S.C. § 1325(b)(2) (West 2008); *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355 (9th Cir. 1994) (adopting the Fifth Circuit’s interpretation in *Commercial Credit Corp. v. Killough (In re Killough)*, 900 F.2d 61, 64 (5th Cir.1990): Calculation of projected disposable income is a two-step process, where the court first multiplies the debtor’s monthly income by 36 and then determines how much of that is disposable.); *In re Richardson*, 283 B.R. 783 (Bankr. D. Kan. 2002) (following *Anderson*); *In re Baker*, 194 B.R. 881, 884 (Bankr. S.D. Cal. 1996) (“Projected income is typically calculated by multiplying a debtor’s monthly income as of the time of confirmation by the number of months of the plan. The projected income is then compared to those projected monthly expenses which are ‘reasonably necessary to be expended for the maintenance or support of the debtor’ to determine the extent to which the projected income is ‘disposable.’ To the extent the projected income exceeds the reasonable projected expenses it constitutes ‘projected disposable income’ and must be committed to the plan.” (citations omitted)); *In re Mullen*, 369 B.R. 25, 32 n.2 (Bankr. D. Or. 2007) (“Before the BAPCPA effective date, ‘projected disposable income’ usually was calculated by multiplying the difference between Schedule I income and Schedule J expenses by the estimated length of the Plan, consistent with the requirement of § 1322(a)(1) that the debtor commit ‘such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.’ Neither the term ‘projected disposable income’ in § 1325(b)(1)(B) nor the commitment of future income requirement of § 1322(a)(1) was amended by BAPCPA.”). While BAPCPA modified the Code definition of “disposable income” to incorporate the new term “current

monthly income” as defined elsewhere in the Code, BAPCPA did not redefine “projected disposable income.”

However, the lack of a statutory definition of “projected disposable income” has led to varying interpretations as bankruptcy courts across the country struggle to ascertain what the BAPCPA amendments mean. Some courts continue to calculate projected disposable income from Schedules I and J, *see, e.g., In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006), some courts calculate it either from Schedules I and J or Form 22C, whichever more accurately reflects the debtor’s anticipated ability to pay creditors, *see, e.g., In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006), and some follow a plain-meaning approach using only the current monthly income figure from Form 22C, *see, e.g., In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006). The plain-meaning approach was found “to be the most persuasive on the question of how to calculate ‘projected disposable income’” by the court in the Southern District of Illinois. *In re Nance*, 371 B.R. 358, 364 (Bankr. S.D. Ill. 2007). The Illinois bankruptcy court explained: This Court, like *Alexander*, finds the placement of the definition of “disposable income” in § 1325(b)(2) indicative of Congress’ intent that “current monthly income” be used in calculating “projected disposable income” in § 1325(b)(1)(B). This conclusion is further buttressed by the fact that Congress made no attempt to define “projected disposable income” anywhere in the statute, much less within the same subsection. Had Congress intended for “projected disposable income” to mean something different than “disposable income,” it certainly could have provided a separate definition of the term.

Furthermore, this Court’s interpretation does not render the word “projected” meaningless. Rather the Court finds that “projected” merely explains the treatment of “disposable income.” The definition of “projected” is “to plan, figure, or estimate for the future expenditures for the coming year.”

Webster's Collegiate Dictionary 932 (10th ed. 1996). Thus, under § 1325(b)(1)(B), a debtor's disposable income is calculated, according to the statutory definition, and then projected or extrapolated over the plan's term of years, *Id.*, 364-365; *see also In re Austin*, 372 B.R. 668 (Bankr. D. Vt. 2007) (§ 1325(b)(2) by incorporating current monthly income, relies upon income data from the pre-petition period. "The statute makes no reference to any other income and since 'current monthly income' is a defined term, the Court finds no support for using income from the date of filing or any other time period to compute 'disposable income.'"); *In re Puetz*, 370 B.R. 386 (Bankr. D. Kan. 2007) (Schedules I and J no longer determine plan payments for above-median income debtors; they do not conclusively establish net monthly income even though they may constitute the debtor's best estimates of future income and expenses); *In re Berger*, 376 B.R. 42 (Bankr. M.D. Ga. 2007) (debtors are not obligated to pay more than the disposable income calculated on Form 22C). The *Berger* case refers to the analogous confirmation requirements for a Chapter 11 individual case and the cross-reference in the statutory language to § 1325(b) when discussing "projected disposable income." BAPCPA added § 1129(a)(15) to Title 11. That section states:

(a) The court shall confirm a plan only if all the following requirements are met:

.....

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan –

(A) the value, as of the effective date of the plan, 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 value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to

be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

The *Berger* court found persuasive Congress' express link of the definition of "projected disposable income" in § 1129(a)(15) to "disposable income" as it is defined in § 1325(b)(2). *See also In re Kolb*, 366 B.R. 802, 816 n.18 (Bankr. S.D. Ohio 2007) (without deciding what weight, if any, § 1129(a)(15) should be given in the context of Chapter 13, the court observed, "§ 1129(a)(15)(B) certainly suggests that 'disposable income' in § 1325(b)(2) and 'projected disposable income' in § 1325(b)(1)(B) were regarded by Congress as the same concept.").

Recognizing the symmetry between the confirmation standards for a Chapter 13 plan and an individual Chapter 11 plan, one commentator has considered the Chapter 13 terms "projected disposable income" and "applicable commitment period" in light of the similar Chapter 11 language at § 1129(a)(15) and concluded that "projected disposable income" is simply annualized disposable income, calculated on Form 22C, and "applicable commitment period," rather than referring to the actual length of a plan, signifies the number of years by which to multiply the annualized disposable income to come to a total sum that the debtor must pay unsecured creditors under the plan. Hon. Randolph J. Haines, *Chapter 11 May Resolve Some Chapter 13 Issues*, 8 Norton Bankr. L. Adviser 1 (Aug. 2007). Under his analysis, a plan therefore need not extend for any particular duration; it need only provide for the payment to unsecured creditors of the dollar amount as calculated above.

The comparative analysis by Judge Haines is consistent with the bankruptcy judge's analysis in this case and consistent

with those cited cases using the “plain meaning approach” to statutory interpretation.

Contrary to the position taken by the Trustee, we find that the definition of “applicable commitment period” in § 1325(b)(4) as five years for an above- median debtor does not refer to a minimum plan duration. It refers, instead, to the time during which the debtor must pay projected disposable income to the Trustee for payment to unsecured creditors. Another statutory provision, § 1322(d), discusses the length of the plan related to above-median income debtors. Section 1322(d) would be superfluous if § 1325(b)(4) set the length of the plan.

After reviewing the statutory language of § 1325(b) and comparing it to § 1322(d) and § 1129(a)(15), we agree that the “plain meaning” approach, as in the cases cited above and the commentary of Judge Haines in the Norton newsletter, is the appropriate method to use when interpreting these statutory provisions. Post-BAPCPA, 11 U.S.C. § 1325(b) is a new creature. While it contains language held over from the old statute, Congress has given it new parameters, with the intention of producing results dramatically different from pre-BAPCPA outcomes. “Projected disposable income” is the disposable income calculated on Form 22C extrapolated over the applicable commitment period. It is the amount to be paid on unsecured claims. The statute requires no more. If the disposable income is negative, there is no applicable commitment period and a debtor is not required to propose a plan that calculates payments to unsecured creditors in the same manner as plan payments to all creditors were calculated pre-BAPCPA. The applicable commitment period is that period of time an above-median debtor must pay disposable income to the Trustee for payment to the unsecured creditors. If there is no disposable income, there is no applicable commitment period, and a debtor may obtain confirmation of a plan that is shorter than five years.

Put another way, does “Applicable Commitment Period” serve as a requirement that the plan last a certain length of time (temporal) or does it reflect a multiplier of the debtor’s projected monthly income so that it reflects a certain amount of money (computational or monetary).¹⁶ The Eighth Circuit BAP held that it was a computational term and not a temporal term.

The U.S. Trustee takes no official position on this difficult issue. *Coop v. Frederickson* was argued before the Eighth Circuit Court of Appeals in April of 2008 and a decision should be issued soon.

Secured Debt on Assets That Debtor Intends to Surrender—Deductions from Gross Income?

Courts are split on this point as well. Some courts hold that debtors may deduct payments that debtors are contractually obligated to make over the applicable commitment period even if the debtor intends to surrender. The United States Trustee’s Program does not support allowance of such payments. Debtors are entitled by statute to deduct the “average monthly payments on account of secured debts.” Does this mean contractually obligated payments as of the date of filing, or does this mean payments that are actually expected to be paid during the applicable commitment period of the Chapter 13 plan?

This is addressed by the court in *In re Kogler*¹⁷

There the Court noted: Section 707(b)(2)(A)(iii) of the Bankruptcy Code provides:

The debtor’s average monthly payments on account of secured debts shall be calculated as the sum of –

(I) the total of all amounts scheduled as contractually due to secured creditors in each

¹⁶ See, e.g., Alane A. Becket and Thomas A. Lee, III, *Applicable Time Commitment: Time or Money?* 25 Amer. Bank. Inst. J. 2, 16 (2006).

¹⁷ 368 BR. 785 (Bankr. W.D. Wis. 2007); http://www.wiw.uscourts.gov/bankruptcy/Decisions_tsu/In_re_Kogler_U.pdf; *Contra, In re Burden* (2007 WL 4556906, Bankr. W.D. Mo. Dec. 20, 2007) (recognizing that its opinion is to contrary of the vast majority of those courts which have considered the question).

month of the 60 months following the date of the petition; and (II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts; divided by 60.

There is an emerging split of authority on this topic. In *In re Skaggs*, 349 B.R. 594, 600 (Bankr. E.D. Mo. 2006), the court indicated that the "primary intent" of Congress in the passage of the BAPCPA was "to ensure that those debtors who can pay their debts do so." The court declined to limit its focus to the phrase "contractually due" and instead construed § 707(b)(2)(A)(iii) as contemplating a forward-looking examination of only those debts which a debtor intends to pay. Likewise, in *In re Harris*, 353 B.R. 304 (Bankr. E.D. Okla. 2006), the court rejected the idea that debtors could include a deduction for secured debt on items which they intended to surrender. Noting that debtors frequently surrender collateral for the "express purpose" of lowering their monthly living expenses, the court stated: When a debtor surrenders collateral, the debtor is no longer required to make the scheduled installment payments. If there is a deficiency after application of the collateral proceeds to the indebtedness, an unsecured claim remains, but a secured debt no longer exists and no payment is due except for an unsecured deficiency balance. *Id.* at 309.

Other courts, however, have taken a contrary view. In *In re Hartwick*, 352 B.R. 867, 870 (Bankr. D. Minn. 2006), the court held that a debtor was entitled to deduct her actual monthly mortgage debt on her Form B22A despite her statement of intention that she planned to abandon the property. According to the *Hartwick* court,

it is unnecessary to characterize § 707(b) as a “gate-keeper to the sanctuary of Chapter 7.” *Id.* at 869. Instead, the court found that Congress did not appear to have had either concepts of fairness or judicial discretion in mind when fashioning the means test. The court stated: The means test presents a backward looking litmus test performed using mathematical computations of arbitrary numbers, often having little to do with a particular debtor’s actual circumstances and ability to pay a portion of debt. Congress has already determined the fairness of application of the means test, and a major objective of the legislation was to remove judicial discretion from the process. *Id.*

Similarly, the courts in *In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007), *In re Nockerts*, 357 B.R. 497 (Bankr. E.D. Wis. 2006), and *In re Walker*, No. 05-15010-WHD, 2006 WL 1314125 (Bankr. N.D. Ga. May 1, 2006), all concluded that debtors were entitled to deduct such payments despite the stated intention to surrender or abandon the collateral. In *In re Randle*, 358 B.R. 360 (Bankr. N.D. Ill. 2006), the court likewise rejected the trustee’s position and stated that the “plain language” of the section directs that the debtor “shall” deduct the amounts scheduled as contractually due. As the court stated: [The statute] does not say that the debtor can deduct this amount only if she intends to keep the collateral post-petition. It does not say that the debtor can deduct this amount only if she intends to continue making the payments due post-petition. And it does not refer to the debtor’s Statement of Intention with respect to the collateral. The provision requires the court to consider only the amounts due under the contract itself. *Id.* at 363.

In the recent case of *In re Mundy*, 363 B.R. 407 (Bankr. M.D. Pa. 2007), the court concluded that the phrase

“refers to the payments due under the contract between the debtor and the secured creditor regardless of the debtor’s intent with respect to retention of the collateral or reaffirmation of the debt.”

Finally, in a blending of these two approaches, the court in the case of *In re Singletary*, 354 B.R. 455 (Bankr. S.D. Tex. 2006), found that while the debtors could deduct payments on surrendered collateral, the means test and its “presumption of abuse” could take into account post-petition changes in the debtors’ circumstances. The court noted that the U.S. Trustee may file a motion to dismiss under § 707(b) for up to forty days after the meeting of creditors. Consequently, “the Presumption of Abuse Motion may be based on a means test calculation that includes any changed circumstances in the Debtors’ position between the filing of the petition and the filing of the motion to dismiss.” *Id.* at 466. Under this approach, debtors may deduct payments on secured debt relating to assets which they intend to surrender in the future, but not payments on secured debt relating to assets already surrendered when the U.S. Trustee’s motion to dismiss is filed. *Id.*

Absence of Plain Language—Courts Pushing Back against Harsh Results Invoking “Plain Language” Test

The difficulties courts are having in interpreting BAPCPA, particularly in the context of Chapter 13, are both intended and unintended consequences of the statute. Congress’ intention was to make the law more mechanical so that judges would have less discretion in these cases; however, there is now a collision between that intent and the courts’ interpretation of the Statute. While the sponsors of BAPCPA made it clear that the statute was intended to channel more debtors into Chapter 13, many courts have followed the Supreme Court’s command that the Bankruptcy Code and statutes in general should be interpreted literally in accordance with “plain language” and without regard to what

Congress might have meant, while other courts disagree, holding that “plain language” must be determined in a contextual fashion.

Like beauty, the plain meaning of BAPCPA is in the eye of the beholder, creating a body of case law with opposing conclusions regarding whether section 707(b)(2)(A)(iii) allows a debtor to educe his or her CMI on account of payments that may never be made. *In re Benedetti*, 372 B.R. 90 (Bankr. S.D. Fla. 2007).

Some have argued that if one passes, the mechanical means test precludes a secondary analysis under Schedule I and J pursuant to Bankruptcy Code sections 707(b)(2) and 707(b)(3) in order to determine what your actual income is. The United States Trustee has objected, arguing that the “totality of circumstances” test from prior to BAPCPA still applies. Relying on the *Pak*, *Paret* and *Pennington* cases¹⁸, courts have tended to reject the idea that the means test conclusively determines whether failure to file a Chapter 13 is an abuse.

Judges typically like to exercise discretion in bankruptcy proceedings. However, when judges exercise their judgment in a mechanical fashion that happens to be favorable to consumers, some other parties do not like that—particularly creditors. Indeed, it is interesting that the consumer bar is now using the statutory method that was advocated by creditors to counteract the very creditor-oriented terms that were thought to be imbedded in the code as amended—and this is happening on many fronts of Chapter 13 litigation.

Is Chapter 13 Appropriate for the Debtor?

Disclosure

Under BAPCPA, I really can’t meet with a client or give her any advice without first making all of the disclosures required in Section 527 of the

¹⁸ *In re Pak*, 343 B.R. 239 (Bankr. N.D.Cal. 2006); *In re Paret*, 2006 WL 2138116 (Bkrctcy. D.Del. 2006); *In re Pennington*, 2006 WL 2505942 (Bankr.D.Del. 2006)

Bankruptcy Code. I have to give the prospective debtor—an “assisted person” for whom I might perform “bankruptcy assistance”—four mandatory disclosures. I must inform this person about the nature of Chapter 7 (liquidation), Chapter 11 (business reorganization), Chapter 12 (family farmer cases), and Chapter 13 (wage earner adjustments) even though the debtor is almost certainly considering only Chapter 7 and Chapter 13. I must explain the services rendered by credit counseling agencies. I must explain that a person who makes false statements in connection with a bankruptcy case may go to jail and that the Attorney General has the right to investigate all bankruptcy cases.¹⁹

Once I get past these pleasantries, I must give three additional disclosures. No later than three days after my first contact with a “person assisted,” I must inform him that:

(A) all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;

(B) all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section [506](#) must be stated in those documents where requested after reasonable inquiry to establish such value;

(C) current monthly income, the amounts specified in section 707 (b)(2), and, in a case under Chapter 13 of this title, disposable income (determined in accordance with section 707 (b)(2)), are required to be stated after reasonable inquiry; and

(D) information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.²⁰

¹⁹ Bankruptcy Code section 527(a)(1)

²⁰ Bankruptcy Code section 527(a)(2)

If this is not enough to scare away a prospective client, BAPCPA also requires me to inform a “person assisted” that he really might not need an attorney. I must give precisely the following statement to each prospective client in a clear and conspicuous fashion and in a paper separate from any other papers: ²¹

Finally, Section 527 (c) of the Bankruptcy Code requires a “debt relief agency” to inform an “assisted person”:

²¹ Bankruptcy Code section 527(a)(3) **“IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.**

“If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. **THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST.** Ask to see the contract before you hire anyone.

“The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

“Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention, need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a ‘trustee’ and by creditors.

“If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

“If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

“If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

“Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.”

reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including—

- (1) how to value assets at replacement value, determine current monthly income, the amounts specified in section 707 (b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707 (b)(2) and related calculations;
- (2) how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and
- (3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

I make these disclosures on my Web site before I see my client for the first time. I take the view that if after reading all of these disclosures, the prospective client is still sufficiently motivated to seek my services, there's a fair chance I might be able to represent that person. Clearly, Congress wanted to place barricades between lawyers and prospective clients through the nature and specifics of the "mandatory disclosures."

Eligibility for Chapter 7

When I meet with a client, my first task is to determine whether he or his family as applicable makes above or below the median income. A person that makes less than the median income or a person with business debts is eligible to file for bankruptcy under Chapter 7 without regard to the means test. Even if you have a lot of secured debt on your mortgage or car, Congress has ruled that you do not have to pay your creditors from your future earnings if you are eligible to file for bankruptcy under Chapter 7. Most people will want to file Chapter 7 if they can. Chapter 13 binds a debtor to submit his disposable income for up to five years to a trustee to satisfy pre-petition creditors. While some debtors want to do this as a matter of honor, most debtors will try to satisfy their obligations to creditors in the manner most economically advantageous to that particular debtor.

If the client's income is above the median, I will assist the debtor in performing the "means test" analysis. There is a specific fee for this that

is roughly related to the time I will spend on analyzing the debtor's income and expenses for means test purposes. This surcharge is payable whether the case will be filed as a Chapter 7 case or a Chapter 13.

The instructions and the committee comments that accompany the “means test” are just about as complicated as the form itself. While a below median income debtor may successfully navigate the “means test” filing pro se, it would be difficult to impossible for an above-median income debtor to successfully navigate the “means test” without competent legal advice.

After the means test is conducted we can advise the client as to whether they are eligible for filing under Chapter 7 or Chapter 13, and we discuss the costs and benefits of both chapters. Chapter 7 allows a debtor to discharge all of their dischargeable debts. This excludes debts incurred by fraud, domestic support obligations, debts arising from drunk driving, most taxes, and several other types of obligations all set out in Section 523 of the Bankruptcy Code. In exchange for the discharge, the trustee has the right and duty to liquidate all of the debtor's non-exempt assets. Poor debtors rarely have non-exempt assets. This means that the debtor can keep substantially all of his property and get released from all debts. Almost all below-median income debtors are eligible for and do file Chapter 7. A debtor, however, can get a discharge only once every eight years in Chapter 7, so Chapter 13 for such a debtor is the only possibility for debt relief.

Chapter 13 is designed for debtors who make more than the median income and whose income exceeds allowable expenses as we have discussed above. Such debtors are required to formulate a plan whereby they pay their projected disposable income for the “applicable commitment period” which is usually five years (sixty months). During this period, the debtors pay the calculated monthly payment to a Chapter 13 trustee—by certified or cashiers' check directly to his account on a monthly basis. From these accounts, the Chapter 13 trustees send monthly payments to creditors in accordance with their priorities under a plan.

Under Chapter 13, the debtor can keep all of his property, as long as the amount paid pursuant to the plan is worth at least as much as the property would have been in liquidation under Chapter 7. In addition, certain debts

may be discharged in Chapter 13 whereas they might not be dischargeable in Chapter 7. This benefit under BAPCPA is not as strong as it was prior to the amendments to the Bankruptcy Code.

About 25 to 35 percent of all people who file for bankruptcy will end up in Chapter 13—some end up there voluntarily because they have equity on their house or arrearages on their car payments that they want to make up; while some are there because they have to be—perhaps because they have substantial assets, or if they have debts that could be discharged in Chapter 13 but not in Chapter 7.

Some individuals wind up in Chapter 13 simply because some states seem to favor Chapter 13 as a resolution in bankruptcy, such as Tennessee and Alabama—and some people who do not have to be in Chapter 13 are steered there by lawyers in the consumer bankruptcy bar who want to generate more fees. Since a Chapter 13 is more complex, it costs more. Some lawyers may encourage their clients to file for relief under Chapter 13 to generate higher fees. It is not easy to prove this practice statistically. However, anecdotal evidence does support this contention.²² A Chapter 13 case tends to cost at least \$1,000 more than a Chapter 7 case. This disparity is because Chapter 13 cases take more time for lawyers to handle. In Chapter 13, the attorney must prepare a plan. The means test analysis is almost always more complicated for above-median income debtors than for below-median income debtors. In addition, the attorney must attend at least one and potentially several court hearings in a Chapter 13 case whereas court hearings are not typically required in Chapter 7 cases.

Fees in Chapter 7 cases tend to be set in the open market on a flat fee basis. Competitive forces are very much at work. Those who charge higher fees for their services are perceived by the marketplace to be providing value for their services. Those who charge lower fees for their services are perceived by the marketplace to be providing basic services, sufficient to get the job done in a particular case.

²² Lefgren, L., McIntyre, F and Miller, M. *Chapter 7 or Chapter 13, Are Lawyers or Clients' Interests Paramount?* (Draft 2007) http://emlab.berkeley.edu/users/webfac/cbrown/e251_f07/Lefgren.pdf

By contrast, Chapter 13 fees tend to be set by the court. Many courts have adopted “no-look” fees in Chapter 13 cases where a fee is a particular amount, currently \$3,000 to \$3,500 in Chicago and Indianapolis, higher in places like New York and lower in places like Oklahoma City. Additional fees can be sought on application to the court, with a detailed itemization and on notice and hearing. Attorneys may make such requests in more complicated cases.

At Lakelaw, our bias is to direct the client to the chapter of the bankruptcy code our client wants, whether it is Chapter 13 or Chapter 7. It is our practice to explain to our clients the costs and benefits of each chapter. It is our experience that clients tend to have a bias toward Chapter 7 with the caveat that a minority of clients feel for moral or other reasons that they would rather pay a portion of their debts under Chapter 13 even if they would not otherwise be required to do so.

Chapter 13 is most beneficial to those debtors who need to pay secured and priority debts while getting relief from the burdens of unsecured creditors’ claims. Thus in Chapter 13, a debtor can get caught up with a mortgage arrearage, pay one’s back taxes, pay one’s back domestic support obligations, and so forth. In addition, a debtor can pay back creditors’ claims at a fraction on the dollar, without interest and finance charges and without incurring income tax on “forgiveness of indebtedness income.” Often, a debtor is happy to have the opportunity to do this, particularly debtors with large student loans making up a significant portion of the debt load. In Chapter 13, the student loan debt is getting reduced pro rata with the other unsecured debt. And the debtor would have had to pay the student loan debt off in any event because it is almost always non-dischargeable.

At the moment, there is some debate concerning the possibility to classify student loan debt separate from other debt so that it could be paid at the normal pay-down rate during the course of the Chapter 13 plan compared to other unsecured debt which is being paid at a fraction. As in most cases, the question of whether student loan debt can be “specially classified” has been meeting with disparate results.²³

²³ A good discussion appears in an unpublished opinion, *In re Delbecq* 06-04785-JKC-7 (Bankr. S. D. Ind. April 26, 2007). This opinion points out that the issue remains unsettled citing *Belda v. Marshall (In re Belda)*, 416 F.3d 618 (7 Cir.2005).

Determining Payments Due in Chapter 13 – Developing a Feasible Plan

After determining the client's median income it is important to determine whether the client has secured debt such as a mortgage loan or a car loan. Although the determination of the amount of money to be paid pursuant to a bankruptcy plan is supposed to be formulaic, one has a lot of latitude in figuring out this amount because of the various interpretations of the law as we discussed above. There is a range of right answers; however, you must be able to determine the proper amount of money the client would have to pay pursuant to their bankruptcy plan—and that plan must be acceptable within the Code and set up in such a way that the client can ultimately succeed, because a large number of people who start Chapter 13 plans fail.

Gathering Information

Before our first meeting, I typically obtain all of the documentation that I need from my client online, including all disclosure forms, questionnaires, tax returns, and pay stubs. Information gathering is the most important part of the bankruptcy filing procedure, and the first step in that process is always conducted online—nobody can be our client without first taking an online questionnaire. People without computers or computer skills may answer this questionnaire in our office with the help of our consumer bankruptcy coordinator. The consumer bankruptcy coordinator also interviews the client in person with respect to those same facts in order to make sure that the client understands the questions. I will then do a preliminary analysis and calculations so that I can show the client a pro forma bankruptcy petition at our first meeting. If we do not have all of the information that we need prior to the first client meeting we will enter an information gathering phase so that a finalized version of the bankruptcy petition can be prepared, and we will go over that petition with the client before filing to see if there are any changed circumstances.

During our initial meeting, we also answer all the questions the client has, including any technical questions about what they have to bring to our meetings. The information they provide is then processed by our consumer bankruptcy coordinator.

In order to accurately perform the means test, we must know exactly how much the debtor made in the past six months. We must know precisely

how much the debtor pays on secured debts. We must know whether there are any special circumstances in the debtor's life, such as medical bills or the need for family support. Religious or charitable contributions must be documented. All of this takes time. Yet this time is imperative since bankruptcy clients can be audited by the United States Trustee Program. Moreover, everything in a bankruptcy petition must be accurate. Failure of an attorney to assure this accuracy could result in imposition of sanctions against the attorney.

So we are put in the position of requiring our client to prove all of the assertions that will be set forth in the client's bankruptcy petition. Sometimes we have to do our own research to verify. For example, clients are not always sure who owns the family home. So we have to check the records of the recorder of deeds. Sometimes, clients don't know all their creditors. So we have to order a credit report. Sometimes, clients don't know the addresses of their creditors, so we have to check online. And we have to be sure we use the right address. Sometimes we have to deal with wage garnishments and judgments. This requires us to act quickly and decisively, even though BAPCPA imposes obstacles to fast action.

At the time of the contract signing, a lawyer interviews the client one last time, and we often obtain information that was not mentioned the first time around.

We then conduct our own due diligence, a process in which we check and verify all of the information we have been given; for example, we look at the records of the recorder of deeds to check on the client's real estate holdings, and we check with the courts to see if they have had any litigation. We also make the client get a credit report so that we can compare the debts they list with what the credit report shows; that credit report is free and available on our Web site.

In summary, we have a standard protocol that we follow in every bankruptcy case. The first step is giving the client the mandatory disclosures; the second step is information gathering, in which we ask the client to get a credit report, bring in all the necessary documents, and fill out our questionnaire; and finally we always ask the client to work with our consumer bankruptcy coordinator to make sure that all the information they have provided is complete.

It is very difficult—and dangerous—to deal with a liar in these matters. We question our clients thoroughly but gently, in the same manner we expect a trustee would, and our questions are probing because it is necessary for them to be so. Indeed, the consequences for violating bankruptcy rules can be pretty serious—if a person makes a willful misstatement, they could lose their bankruptcy discharge, which means that they could lose the benefits of all of the hard work that has already been done in their bankruptcy petition; or if they defraud a creditor, they could also face serious trouble, including criminal prosecution and up to five years in federal penitentiary.

Counseling the Client

We generally have three meetings—an initial meeting to ascertain client strategy; the second to finalize the bankruptcy petition; and the third being a meeting with the Chapter 13 trustees pursuant to Section 341 of the Bankruptcy Code. Typically, this is the client's first and only interaction with the “bankruptcy system.” Chapter 13 trustees are appointed by the United States Trustees throughout the country, each serving a particular region or area. It is the task of the Chapter 13 trustee to set up an organization to oversee all Chapter 13 cases in that area. In large metropolitan areas, this task might be divided among more than one Chapter 13 trustee.

The Chapter 13 trustee assures that all the rules and regulations are followed and that the United States Trustee's policies concerning means testing and other matters are implemented. The Chapter 13 trustee may be interested in how a plan is formulated, how a payment is calculated, the percentage paid to creditors, and a myriad of other issues. Ultimately, the Chapter 13 trustee recommends to the court whether a plan should or should not be confirmed.

Most cases are resolved on this consensual basis. Occasionally, disagreements occur and courts must decide. Because of the volume of these cases and the volume of the court's calls, not to mention the cost of litigation and the general inability of debtors to pay for it, it is desirable to work out disputes without the need for litigation. It is my experience that matters do not get litigated in Chapter 13 cases unless such matters are truly necessary to accomplish the debtor's objectives.

Credit Counseling

Before a debtor can file any bankruptcy case, he must submit to a “pre-bankruptcy credit counseling briefing.” This costs about \$50 and takes about two hours to complete. This is supposed to be a “consumer protection” that can advise a creditor if he “really needs” to file a bankruptcy case. This must be done within 180 days prior to filing a bankruptcy case but not on the actual day of filing. It has been my experience that not one debtor client has ever been dissuaded from filing a bankruptcy case owing to a pre-bankruptcy credit counseling. I have observed numerous bankruptcy cases getting dismissed, at least in the early days of BAPCPA, for failure to have taken pre-bankruptcy credit counseling.

Given that these agencies are supposed to be “not for profit” and given the relatively small amount they can charge for their services, I have often wondered who benefits from this particular aspect of the Bankruptcy Code.

Confirmation – Execution of the Plan

We have enjoyed a high rate of plan confirmation. We try to establish plans where clients have a chance to succeed. All too often people commit to Chapter 13 plans which fail and ultimately end up in Chapter 7 anyway. This is the highest cost and poorest outcome possible. One has to pay an additional attorney’s fee on conversion of the case to Chapter 7. In such cases, a debtor might have been better off in Chapter 7 in the first place.

Frequently, debtors tried to file Chapter 13 cases to “save their house”—an understandable objective. In today’s market, however, with declining values, I do not encourage debtors to try to “save their house” when they have no equity in the home and large mortgage arrearages. In such cases, it is more reasonable economically to walk away, rent for a while, get on one’s feet, and then seek to reenter the housing market at the newer lower costs now available.

Post-Bankruptcy Recovery

We have a unique program called “Lake Law Cares.” To the extent that the client needs other financial resources beyond what they get in our financial management course, we will make referrals to them in the social services

area, or whatever it takes to deal with the root cause problem that got them into their bankruptcy situation. We try to set our clients up for success—in most cases, Chapter 13 clients do not need expertise, but what they do need is support. For example, they need to budget. They need to eliminate the destructive behaviors or even addictions that led to their bankruptcy in the first place. Those who have difficulty with money, for example, can have their Chapter 13 payment withdrawn directly from their paycheck. This one feature can have a significant impact on assuring success of a plan. And it can encourage a debtor to engage in savings in the future.

People who have social problems must be encouraged to deal with them. We refer people to Alcoholics Anonymous, Gamblers Anonymous, support groups for compulsive shoppers, and many other similar agencies. We refer people to vocational support groups as well.

Obviously, credit cards must go. I try to symbolically cut them into pieces. I keep scissors in my office for this purpose.

In most cases, however, our clients primarily require development of management skills. The Bankruptcy Code requires that debtors take a financial management course. This online course, however, is just the beginning for most people.

Much of the information that we need to provide our clients with is available on the Web. There are specific areas on our Web site designed to answer the client's key questions, and if they come to our office with questions, we will often go on the Web with them and help them to find the answers they are looking for.

Difficult Features of a Chapter 13 Filing

Perhaps the most complicated feature of a Chapter 13 filing is the means test, because it is so ambiguous. Therefore, we use it conservatively for those clients who do not have issues—clients with sufficient income and expenses under control so that they can perform a plan that meets the United States Trustee's guidelines. We use it aggressively for those who have unique issues, such as ongoing medical expense, large student loans, and similar circumstances. In some cases, we have to negotiate with the

Chapter 13 trustee or the United States Trustee over how much the client's payments should be, or whether or not the Chapter 13 debtor is allowed to keep a certain type of property.

Debtors who file Chapter 13 are sometimes scolded by parties who will want to know why they are in debt if they are living so well, and when that attitude arises you have to address it sensitively. The other party needs to recognize that the debtor does not want to be in a bankruptcy situation, and they want to pay as little as possible while there. It is like every other negotiating process—the other party is negotiating on behalf of the collective well-being of the creditors, while you are representing the debtor and trying to satisfy the debtor's obligation to their creditors.

Dealing with a debtor who does not want to tell you the truth can also be a difficult situation; you have to develop a sixth sense and good people skills in order to determine if the client is being truthful—and if they are not, you have to deal with that situation. In such cases, I remind the client, in writing, the consequences of false or misleading statements in a bankruptcy petition, including loss of discharge as well as possible criminal prosecution. In rare instances, I will withdraw from the representation.

Linguistics can also be a problem. If I have a client who does not speak English very well, our meetings can be difficult; I speak Spanish sufficiently to conduct a client interview, but I may need an interpreter for clients who speak other languages. I have found that some clients who speak English sufficiently to conduct their business do not speak English sufficiently to be able to understand the complexity of bankruptcy. I encourage these clients to provide an interpreter. If they cannot, I can usually find an attorney friend who speaks the necessary language who will help in a telephone conference as needed.

Best Practices for Bankruptcy Filings

The consumer bankruptcy coordinator has specific things that they are looking for in these cases such as the precise amounts in the debtor's pay stubs, deductions, secured creditor payments, and the like. We need exact figures for these in order to make our means test analysis. Gathering such facts is uneconomical for attorneys. This task must be delegated even if the final analysis must be made by an attorney.

Therefore, in order to handle a bankruptcy proceeding effectively, you have to codify your practice in a standardized, simplified way. These are all flat fee cases, so you have to be very efficient. Our practice allows us to efficiently and effectively represent our clients, typically with only three contacts with an attorney.

The American Bar Association has a small solo bankruptcy sub-committee that puts out a bankruptcy checklist, and we adhere to it and incorporate it into our protocols. That checklist calls for a fair amount of checking and verification, and a fair amount of redundancy in how you do things. For example, a client must not be called into a meeting to file a bankruptcy case until some other lawyer who has not been working on their filing checks it to make sure it has been done correctly. Therefore, two sets of eyes will always review the client's bankruptcy filing—a practice that I think is highly beneficial. The American College of Bankruptcy has also issued a best practices memorandum.²⁴

We also look at every mortgage that the client has in order to determine if they are connected with any truth in lending violations. In order to represent a debtor in Chapter 13 you need to know about any possible consumer claims, as such a claim could be one of the most important assets a debtor has. I have been quite successful in identifying and pursuing complaints against mortgage lenders under the Truth in Lending Act and other consumer protection statutes in response to mortgage foreclosures. These cases can be pursued in the bankruptcy court as an adjunct to the main Chapter 13 debt adjustment case.

The Judge's Role in Bankruptcy Filings

Judges do not decide many of these cases; much of the process comes down to a negotiation between the debtor and the trustee. Judges handle contested matters, and the overwhelming number of bankruptcy matters are not contested.

The judge's role in a bankruptcy hearing, by Congress' design, is supposed to be minimized. A judge is going to hear hundreds of Chapter 13 cases on any given day, and most will be cases in which nothing much happens—i.e., the

²⁴ http://www.amercol.org/images/CLI_1388157_v1_Best%20Practices%20Committee%20Update%20and%20Sommer%20Report%20and%20Questionnaire.DOC

judge merely decides whether the debtor will get another month to formulate a plan or to catch up on a payment, or have the automatic stay lifted so that creditors can continue a foreclosure, repossess a car or otherwise go about their business. Consequently, most of the decisions that judges are called upon to make in these cases on a day-to-day basis are fairly routine.

Having said that, there are many areas of controversy, some of which we have discussed above. As in many areas of bankruptcy, in light of BAPCPA, there has been great uncertainty that must be resolved in the courts. When everyone knows the operative rules, a great deal of business can be conducted without court intervention.

Final Thoughts

Chapter 13 is not something that most debtors want to be in, but some lawyers like it because it provides the opportunity for more fees. Chapter 13 cases take more work, but generally receive at least \$1,000 more in compensation. As a result of the new Code there are now more people in Chapter 13 than there otherwise would have been—but not as many as Congress expected. These increased Chapter 13 filings have increased the complexity and costs of getting into bankruptcy; some people thought that those additional costs would keep people out of bankruptcy, but that is not the case. Indeed the number of both Chapter 13 and Chapter 7 filings in a recent month was 40 percent higher than was the case at the same time last year.

Depending upon what happens in our economy in the months to come, I expect that we will see a substantial increase in bankruptcy filings throughout the year.

However, while there has been a marginal increase in the number of Chapter 13 filings as compared to years' past, that increase is not so much as to justify the drastic changes that have been made as a matter of policy.

Banking interests were successful in obtaining substantial modifications to the Bankruptcy Code under BAPCPA. Indeed, the theme of this enactment was to restore the foundations of secured credit. It remains for Congress to determine whether the social costs of BAPCPA will be ultimately deemed to be worth the perceived benefits in its passage.

David P. Leibowitz holds a B.A. in economics from Northwestern University and received his J.D., cum laude, from Loyola University of Chicago School of Law in 1974, where he also served as note editor of the law review. While at Loyola, he became a member of the Alpha Sigma Nu Jesuit Honor Society.

After law school, Mr. Leibowitz served as a judicial clerk to the late John C. Hayes of the Illinois Appellate Court in Chicago. He then joined the bankruptcy boutique of Schwartz Cooper Kolb & Gaynor Chartered in 1976, serving as a partner at that firm from 1980 until 1991. There, he successfully argued numerous cases in the Seventh Circuit Court of Appeals as well as in the Illinois Supreme Court. He was on the brief in the matter of UNR Industries Inc., establishing the authority of the bankruptcy court to appoint a legal representative for future claimants long before the Bankruptcy Code explicitly established that right. In 1991, Mr. Leibowitz was appointed to the private panel of trustees by United States Trustee Scott Michel.

From 1991 until 1999, Mr. Leibowitz was a partner with the Chicago firm of Freeborn & Peters, where he established and led the firm's bankruptcy practice. During that time, he successfully represented many mortgage lenders and developers in real estate reorganizations. He also successfully pursued the leading case of Leibowitz v. Parkway Bank to resolution in the Seventh Circuit Court of Appeals in his role as bankruptcy trustee. In addition, Mr. Leibowitz successfully pursued a RICO claim as bankruptcy trustee in the matter of Discount Merchandise.

During this time, Mr. Leibowitz also served as adjunct professor of law for John Marshal Law School's LL.M. program in real estate. He also served as president of his local school boards in Highland Park, Illinois, successfully consolidating three previously unaffiliated elementary school districts, passing a major bond issue for redevelopment of the schools, and establishing a pioneering dual language immersion program for elementary school students.

Mr. Leibowitz has served as the chair of the ABI's subcommittee on unsecured creditors and was an author of the ABI's Creditors' Committee handbook. He currently serves on the ABI's Commercial Fraud Task Force and has made presentations and published numerous articles for that committee. He is certified as both a consumer bankruptcy attorney and a business bankruptcy attorney by the American Board of Certification.

Since 2005, Mr. Leibowitz has developed the concept of Chapter 7 trustees pursuing mortgage related claims under the Truth in Lending Act and related statutes. He has written an article on this subject for NABTalk and his paper "Residential Mortgage

Issues in Consumer Bankruptcy Cases” will appear in the 2008 Norton’s Annual Survey of Bankruptcy Law. He has spoken about this subject nationally including at the Wisconsin Bar and Arizona State Bar Annual Conventions.

In 1999, Mr. Leibowitz established Law Offices of David P. Leibowitz, now known as Lakelaw, in Waukegan, Illinois as a solo practice. Lakelaw now has grown to five lawyers in Illinois, handling Illinois matters from Chicago north to Wisconsin. Lakelaw also has established a Wisconsin affiliate with offices in Kenosha and LaCrosse, Wisconsin. Mr. Leibowitz is a member of both the Illinois and Wisconsin bars and has practiced in bankruptcy courts throughout the country.

Mr. Leibowitz is active in the CARE program in Northern Illinois and Southern Wisconsin. In 2006, he received the “Excellence in Pro Bono Service Award” from the United States District Court for the Northern District of Illinois and the Chicago Chapter of the Federal Bar Association. In 2007, he received the Pro Bono Service Award from the Lake County Bar Association’s Volunteer Legal Program.

Dedication: *I would like to thank my partner James W. McNeilly, Jr. and my associate Sharanya Gururajan for their work incorporated in this chapter. I would also like to thank my wife Sandy Gordon for her constant loving encouragement and support in all I do.*



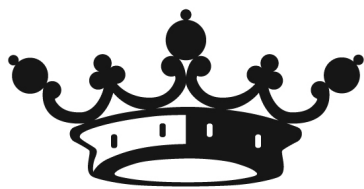
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