

Applicable Commitment Period: Time or Money?

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Under the Bankruptcy Code prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), §1322(d),¹ "Contents of plan" stated:

The plan may not provide for payments over a period that is longer than three years unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.



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BAPCPA deleted former §1322(d) and replaced it with an entirely new provision. Section 1322(d) now determines maximum plan length by reference to the debtor's (and the debtor's spouse's) current monthly income, multiplied by 12, and compared to the state's median income. Specifically, if the debtor and the debtor's spouse have combined current monthly income² above the median income, the debtor's plan may be no longer than five years. If income is below the median, then the plan may be no longer than three years or, with court approval, five years.

A companion provision is found in new §1325(b), which introduced the term "applicable commitment period" (ACP). Section 1325(b)(1) states that if a trustee or unsecured creditor objects, a plan may not be confirmed unless the plan provides that "all of the debtor's projected disposable income to be received in the three year period applicable commitment period...be applied to make payments to unsecured creditors under the plan."³

A debtor's ACP is defined in §1325(b)(4) as three years for debtors whose income (along with their spouses' income) is below the median, or not less than five years if the income of the debtor and the debtor's spouse combined is

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above the median income for a family of similar size. The applicable commitment period may be less than three or five years if all unsecured claims are paid in full over a shorter period. (§1325(b)(4)(B)).



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Under BAPCPA, a question important to all unsecured creditors is whether the applicable commitment period is a "temporal" requirement or a "monetary" requirement. In other words, does the applicable commitment period define how long a debtor's plan must be, or is it simply a formula for

allowed unsecured claims over a shorter period. Section 318(2), (3) and (4) make conforming amendments to §§1325(b) and 1329(c) of the Code.⁴

The title of this section seems to indicate that the amendment is intended to govern a plan's *duration*. The text likewise mandates that above-median-income debtors make payments "over a period not less than five years." However, for below-median-income debtors, the text refers to the *maximum* time a plan may run, *i.e.*, "may not be longer than three years." This implies that for these debtors, plans may be shorter than three years.

The answer to this time/money question can have a significant impact on dividends payable to unsecured creditors. Under the view that the ACP determines the *amount* a debtor must pay into a plan, a debtor's monetary commitment is fixed at confirmation, potentially subject to early payoff as long as the monetary threshold is met. A debtor whose financial circumstances allow an early

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determining the minimum amount a debtor must pay to unsecured creditors in order to obtain a discharge?

The scant legislative history addresses the provision, yet what is available illustrates the dilemma:

Sec. 318. Chapter 13 Plans to Have a Five-Year Duration in Certain Cases. Paragraph (1) of §318 of the Act amends Bankruptcy Code §§1322(d) and 1325(b) to specify that a chapter 13 plan may not provide for payments over a period that is not less than five years if the current monthly income of the debtor and the debtor's spouse combined exceeds certain monetary thresholds. If the current monthly income of the debtor and the debtor's spouse fall below these thresholds, then the duration of the plan may not be longer than three years unless the court, for cause, approves a longer period up to five years. The applicable commitment period may be less if the plan provides for payment in full of all

payoff will not be subject to having future income scrutinized on a yearly basis, and possibly captured by a trustee's request to modify the plan. On the other hand, interpreting the ACP as determining mandatory plan *length* allows unsecured creditors the benefit of a change in the debtor's finances for the better.⁵ This article will examine the arguments for each position.

The "Applicable Commitment Period" Determines Mandatory Plan Length

Having lived through the last nine years of bankruptcy reform debate, it appears that Congress intended §1325(b)(4), describing the applicable commitment periods, to set forth the *minimum time periods* for a chapter 13 plan. One of the strongest arguments for this is the addition of §1325(b)(4) itself. Prior to BAPCPA, plan length was set forth in §1325(b)(1)(B), which stated that upon

⁴ H.R. Rep. no. 109-31(j), April 8, 2005.

⁵ And, conversely, allows the debtors to reduce plan payments if his finances deteriorate.

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¹ All references to "section" and "§" refer to Title 11 of the U.S. Code.

² This article does not address the issue of whether a debtor's spouse has "current monthly income" as described in §1325(b)(4).

³ Showing additions and deletions made by BAPCPA.

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the objection of the trustee or allowed unsecured creditor, the court may not approve a plan unless the plan provided for "all of the debtor's projected disposable income to be received in the three-year period beginning on the date of the first payment." As mentioned above, the ACP can be shortened if all unsecured creditors are paid in full. Therefore, if unsecured creditors are not paid in full, it stands to reason that ACP can not be shortened.

Also, as noted above, former §1322(d) set the maximum length of a plan at not longer than three years or, with court approval, five years. BAPCPA added §1325(b)(4) to reflect the *required* length of time for a plan, based on the debtor's income. Mandating that a debtor with income above the median commit future income for five years is in concurrence with the changes to §707(b). That provision subjects above-median-income debtors to the means test. Together, these provisions reflect Congress' intent that debtors who can afford to repay their creditors should be required to do so.

The applicable commitment period is just that—a time "period." BAPCPA does not describe an "applicable commitment amount" or an "applicable commitment payment." The plain meaning of the term "applicable commitment period" is, simply stated, a requirement for the time during which a debtor must pay into a chapter 13 plan.

Accepting the position that the applicable commitment period is merely a monetary threshold that a debtor must meet calls into question two additional BAPCPA provisions. First, §521(f) requires the debtor to provide to parties in interest copies of post-petition tax returns and, in chapter 13, annual financial statements. If BAPCPA merely requires completion of a worksheet that determines the dollar amount that a debtor must repay, there is no purpose for the additional financial information required by §521. Thus, clearly, it is a Congressional mandate that a debtor's financial situation be reviewed at least annually to determine if there is cause to require the debtor to repay more to his creditors as a result of an increase in income.

A periodic review of a debtor's finances may ultimately invoke §1329,

which allows modification of a confirmed plan to decrease or increase the amount of payments. Section 1329 protects all parties from a change in circumstance, acknowledging that it is very difficult to project one's income and expenses over an extended period of time. Section 1329 allows debtors to reduce their payments if they fall on hard times, but it also allows the trustee or unsecured creditor to move for increased payments should the debtors do better than expected. If the ACP is interpreted to fix, at confirmation, an amount that must be paid, rather than a time limit during which all disposable income must be paid, §1329 could be nullified by payment of a lump sum equal to the debtor's disposable income multiplied by either 36 or 60 months. This result would be of particular benefit to wealthy debtors who might have exempt reserves, such as IRAs, from which to fund immediate completion of a chapter 13 plan upon confirmation with no regard to future increases in income.

We have been directed to read a statute according to its plain meaning unless doing so would result in an absurd result. While completing a plan in less than three or five years without paying 100 percent to unsecured creditors may or may not be what Congress intended, the result certainly does not rise to the level of "absurd."

Conversely, debtors whose B22C forms produce artificially low disposable income could use their excess income, which would be evident from a review of Schedules I and J, to accelerate completion of their plans. In either case, a debtor would be in a position to pay the plan off in less than the ACP, and thus avoid a possible modification increasing payments during the ACP.

This position is further supported by the fact that §1306(a)(2) specifically

provides that "earnings from services performed by the debtor after commencement of the case, but before the case is closed, dismissed or converted," are property of the estate. Combined with the provision in §1322(a)(1) that the debtor submit "all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as necessary for execution of the plan," it seems clear that the future income of the debtor is available to the trustee. Post-BAPCPA, the ACP defines the term. Why else would Congress have included §1325(b)(4)(B), which allows plans for less than three or five years *only if* unsecured claims are paid in full during the shorter plans?

A debtor should not be permitted to simply pay off a plan at any time he chooses, especially if the debtor's ability to pay is underrepresented by the official form calculations or if his financial situation improves during the life of the plan. This is because the confirmed plan, providing for payments over a specified time period, binds not only the creditors, but the debtor as well.⁶ If a debtor wishes to buy out the plan, he must file a motion to modify the plan to complete it early or, at minimum, a motion to sell or refinance property.⁷ In either case, parties in interest will then have the opportunity to oppose the early payoff and instead require full payoff of all claims as a condition to approval. These cases have met with mixed results that are beyond the scope of this article. However, BAPCPA makes it clear that the focus of bankruptcy should be on a debtor's ability to pay, the means test being the clear example; thus, motions for early payoff at less than 100 percent should be denied according to the concept of "applicable commitment period" and the overarching goal of BAPCPA that debtors should be required to repay creditors to the best of their ability.

The "Applicable Commitment Period" Determines the Amount that Must Be Paid

First and foremost, this question must be viewed according to the basics of statutory interpretation. Statutory plain language and its straightforward meaning are determinative unless running *contra*

⁶ 11 U.S.C. §1327(a).

⁷ Some courts have treated a motion to sell property and pay off the plan as a motion to modify.

to legislative intent,⁸ and a court must enforce it in accord therewith.⁹ Thus, “[u]nder the plain-meaning rule, the process is simple. If the language of the statute is unambiguous, courts then review the statutory language in a vacuum, guided only by the common usage of the words therein.”¹⁰ This is because legislative intent is most persuasively manifest by the words of the statute, “and their apparent meaning should be rejected only on substantial, unambiguous evidence supporting a contrary interpretation.”¹¹

A plain reading of §1325(b) does not lead to the conclusion that a plan must last for three to five years. Rather, §1325(b) merely states that a debtor must contribute to the plan all projected disposable income *that he receives* during the applicable time frame, either three or five years. Accordingly, as long as a debtor pays the required amount, presumably he may “pre-pay” or “buy out” his plan by tendering the full amount due in a shorter period of time. This was made possible pre-BAPCPA typically when a debtor refinanced or sold appreciated property. After Oct. 17, a debtor may have excess income over the “disposable income” calculated by using Form B22C in two situations. First, “current monthly income” (CMI) as defined by §101(10A) is not necessarily reflective of a debtor’s actual monthly income. A debtor may have more income than the formula for CMI calculates. Second, the debtor may have excess income after deducting the standard expenses allowed by BAPCPA and the official form if the debtor’s actual expenses are less than the allowances. In either of these circumstances, the amount required to be paid to the trustee each month under §1325 may be less than a debtor’s actual excess income. By devoting the excess to plan payments, or by other means such as refinancing, a debtor may be able to complete a plan sooner. This is not dissimilar to cases pre-BAPCPA that have allowed a debtor to refinance in order to pay off a plan.

Support for this proposition can be found in §1328(f), which prohibits the court from granting a discharge to a debtor who has received a discharge in a chapter 13 case filed within two years of the second filing. At first blush, this provision may appear to be in error,

since most plans typically last at least 36 months, and thus very few debtors would be subject to the two-year limit imposed by this provision. However, reading the applicable commitment period to be a monetary provision makes sense of §1328(f), since Congress realized that a debtor may be able to pay off a plan in less than 36 months. Thus, it prohibited repeat discharges for at least two years.

Under this interpretation, parties are not without recourse to increase the amount a debtor must pay into a plan. A diligent trustee or party may always petition the court for a modification of the plan to increase plan payments. There is a body of case law that holds that the disposable-income test does not apply to plan modifications on the theory that §1329, permitting modifications, details the Code sections with which a modification must comply, and §1325(b), containing the disposable-income test, is not one of the enumerated sections.¹² Thus, assuming a debtor has not already tendered full payment to the trustee, a court may require that a plan be modified to comport with a debtor’s changed circumstances.

¹² The opposing view holds that because §1325(a) makes reference to §1325(b), plan modifications must comply with §1325(b).



We have been directed to read a statute according to its plain meaning unless doing so would result in an absurd result. While completing a plan in less than three or five years without paying 100 percent to unsecured creditors may or may not be what Congress intended, the result certainly does not rise to the level of “absurd.” Thus, the statute should be read strictly as merely dictating the total amount a debtor must pay, as opposed to requiring a specific plan length. “The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.”¹³

Conclusion

Without question, this is an issue of significant import to unsecured creditors. As with many of the provisions of BAPCPA, how the “applicable commitment period” ultimately will affect chapter 13 plans will be determined by bankruptcy courts across the country, potentially leading to a diversity of results. This, unfortunately, is a situation that Congress intended and attempted to avoid. ■

¹³ *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991).

CONSISTENT RESULTS

December 2005
Monarch Windows and Doors, LLC
An Affiliate of
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has acquired substantially
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Chapter 11 Trustee for Jenkins Manufacturing Company,
Inc.'s parent, Summit Metals, Inc. on this transaction.

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November 2005
RHC Acquisition, Inc.
has acquired substantially
all of the assets of

Riverside Millwork Company, Inc.
The undersigned acted as exclusive investment banker to the
Chapter 11 Trustee for Riverside Millwork Company, Inc.'s
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⁸ *U.S. v. Ron Pair Enters. Inc.*, 489 U.S. 235, 242 (1989).

⁹ *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

¹⁰ *680 Fifth Ave. Assocs. v. Mutual Benefit Life Ins. Co. in Rehabilitation (In re 680 Fifth Ave. Assocs.)*, 156 B.R. 726, 734 (Bankr. S.D.N.Y. 1993).

¹¹ *State Water Control Bd. v. Train*, 559 F.2d 921, 924 (4th Cir. 1977).