"PROJECTED DISPOSABLE INCOME" UNDER BAPCPA: MANIPULATION OF STATUTORY TEXT AND CONGRESSIONAL INTENT TO ACHIEVE THE DESIRED RESULT OF IGNORING BAPCPA

I. INTRODUCTION

Meet the Roberts. Mr. and Mrs. Robert earned an average of $10,000 monthly in the six month period preceding the filing of their Chapter 13 bankruptcy.[1] The Roberts now earn only $7,500 monthly because Mrs. Robert lost her job and got a new job earning less money. Which income do the Roberts use to calculate the amount that they must repay to their unsecured creditors? Meet the Thomases. Mr. and Mrs. Thomas earned an average of $5,000 monthly in the six-month period preceding the filing of their Chapter 13 bankruptcy. Due to Mr. Thomas securing a higher paying job, now the Thomases earn $8,000 monthly. Which income do the Thomases use to calculate the amount they must repay their unsecured creditors? The answers to these significant questions are not clear or even consistent among courts.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[2] created a wide split among courts in regards to the method that Chapter 13 debtors must use to calculate the "projected disposable income" that debtors must pay to their unsecured creditors.[3] When Congress enacted BAPCPA, it included a new definition of income arguably for use in the calculation of a debtor's projected disposable income.[4] The new income definition creates confusion as debtors across the United States experience large discrepancies among courts,[5] not to mention among jurisdictions, in terms of

1. See *infra* note 21 for an explanation of Chapter 13 cases.

2. Pub. L. No. 109-8, 119 Stat. 23 (codified in 11 U.S.C. and scattered sections of 12, 18, and 28 U.S.C.).

3. *See* Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 307–08 (B.A.P. 1st Cir. 2007) (noting that term "projected disposable income" under BAPCPA "has generated two competing interpretations," one for use of anticipated income and another for use of historical income).

4. *See* 11 U.S.C. § 1325(b)(2) (2006 & Supp. I 2007) (providing "disposable income" definition). Congress's new definition of income, found in § 101(10A) of Title 11, explained *infra* note 28, and requiring a six-month average of income, is applicable to Chapter 13 debtors under the definition of "disposable income" in § 1325(b)(2). Courts that do not find for the use of the new income definition argue that it does not apply to the calculation of "projected disposable income," only "disposable income." *See, e.g.*, *In re* Hardacre, 338 B.R. 718, 722–23 (Bankr. N.D. Tex. 2006) (arguing that term "projected" modifies "disposable income").

5. *Compare In re* Nance, 371 B.R. 358, 364–65 (Bankr. S.D. Ill. 2007) (finding for use of historical income), *with In re* Fuller, 346 B.R. 472, 482 (Bankr. S.D. Ill. 2006) (finding for use of anticipated income).

what constitutes projected disposable income under BAPCPA.[6] Courts debate whether projected disposable income requires either an anticipated or historical calculation of income.[7]

When courts apply the use of anticipated income, the results do not align with BAPCPA and produce varying effects on debtors.[8] In *Kibbe v. Sumski* (*In re Kibbe*),[9] the court mandated the use of anticipated income for Karen Kibbe because she secured a higher paying job just prior to filing her bankruptcy.[10] Indeed, Ms. Kibbe's monthly historical income was $1,068.50, while her monthly anticipated income was $5,027, resulting in an increase of $3,958.50 monthly.[11] Thus, the court did not allow Ms. Kibbe to rely upon the explicitly stated definition of income under BAPCPA and forced her to include her anticipated income if she wished for the court to confirm her bankruptcy.[12] In *Pak v. eCast Settlement Corp.* (*In re Pak*),[13] the court found that John Pak had to devote his higher anticipated income in order to provide all projected disposable income.[14] Indeed, Mr. Pak's historical income was $2,666.67, but the court forced him to use the higher $8,666.67 anticipated income figure if he wished for the court to confirm his plan, leaving Mr. Pak unable to rely upon the statutory text of BAPCPA.[15] Thus, both Karen Kibbe and John Pak experienced a detrimental effect from the courts' interpretations of BAPCPA.

6. *Compare In re* Alexander, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006) (finding for use of historical income), *with In re Hardacre*, 338 B.R. at 723 (finding for use of anticipated income).

7. *See Kibbe*, 361 B.R. at 307–08 (recognizing two competing interpretations of statute to determine type of income used in calculation of "projected disposable income"). *Compare In re Alexander*, 344 B.R. at 749 (finding for use of historical income), *with In re Hardacre*, 338 B.R. at 723 (finding for use of anticipated income). Some courts find that there is a third interpretation, separate and distinct from the position for the use of anticipated income, which begins with the use of historical income, but allows debtors to rebut the use of that income, in favor of the use of anticipated income, if the debtors prove "special circumstances." *See, e.g.*, *In re* Featherston, No. 07-60296-13, 2007 WL 2898705, at *9 (Bankr. D. Mont. Sept. 28, 2007) (noting two separate views, both of which may utilize anticipated income). See *infra* Part II.B.3.b for a discussion of this third viewpoint and "special circumstances." This Comment classifies this third interpretation as part of the broader argument for the use of anticipated income. Further, courts also debate the expense component of projected disposable income. *See, e.g.*, *In re* Arsenault, 370 B.R. 845, 851 (Bankr. M.D. Fla. 2007) (recognizing that term "projected disposable income" raises same question for expenses, i.e., whether they are historical expenses or anticipated expenses). This Comment focuses solely on the income component of projected disposable income.

8. *See, e.g.*, Pak v. eCast Settlement Corp. (*In re* Pak), 378 B.R. 257, 259, 268 (B.A.P. 9th Cir. 2007) (imposing detriment on debtor by forcing him to pay higher anticipated income), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 874 (9th Cir. 2008); *Kibbe*, 361 B.R. at 306, 312 (requiring commitment of higher anticipated income); *In re* Jass, 340 B.R. 411, 418 (Bankr. D. Utah 2006) (providing benefit to debtors by allowing use of lower anticipated income).

9. 361 B.R. 302 (B.A.P. 1st Cir. 2007).

10. *Kibbe*, 361 B.R. at 306, 312.

11. *Id.* at 306–07.

12. *See id.* at 315 (affirming bankruptcy court's denial of confirmation).

13. 378 B.R. 257 (B.A.P. 9th Cir. 2007), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 874 (9th Cir. 2008).

14. *Pak*, 378 B.R. at 259, 268.

15. *Id.* at 259.

The use of anticipated income does not always, however, result in a detriment to debtors. In *In re Jass*,[16] the court allowed the debtors, Paul and Wendy Jass, to utilize their anticipated lower income because the Jasses argued that they were unable to pay the higher figure due to Mr. Jass's serious medical problems.[17] *Kibbe*, *Pak*, *Jass*, and numerous other courts force debtors to calculate projected disposable income using a calculation of income that varies from that required under BAPCPA and, thus, these courts manipulate the statutory text of BAPCPA to achieve the desired result of abandoning BAPCPA to maintain pre-BAPCPA practices.[18]

This Comment examines the split among courts regarding which calculation of income BAPCPA mandates that debtors should use to calculate projected disposable income, including a proposed resolution to the split. Part II of this Comment discusses the split among courts that interpret BAPCPA to require the use of anticipated income and those that interpret the requirement of historical income. Part II.A provides an overview of the statutory text leading to the split, discusses the pre-BAPCPA calculation of projected disposable income, and summarizes the statutory interpretation rules that all courts purport to follow in reaching their conclusions. Part II.B reviews the terms and phrases in the pertinent section of Title 11, as well as other sections and chapters, which the majority courts rely upon to find for the use of anticipated income. Part II.C discusses the minority courts' interpretation of the explicitly stated definition of income under BAPCPA, as well the minority's position in refuting the majority's interpretation. Additionally, this Part reviews the minority courts' discussion of congressional intent that supports the use of historical income, including a discussion of statutory provisions outside the pertinent section of Title 11 that support this view.

Part III evaluates the arguments for both the use of anticipated income and historical income. Part III.A focuses on the plain meaning of the pertinent statutory text to support the use of historical income and courts' failure to consider this plain meaning when finding for the use of anticipated income. Part III.A also discusses courts' manipulation of statutory text to achieve the desired result of employing the pre-BAPCPA method for income calculation. Part III.B discusses the congressional intent for the use of historical income, including a discussion of the legislative history surrounding BAPCPA, as well as provisions outside of the pertinent section, that support a congressional intent to use historical income. Part III.C argues that the use of historical income does not cause absurd results that courts cannot reconcile with the statutory text. In conclusion, this Comment proposes that BAPCPA mandates the use of historical income and does not support the use of anticipated income.

16. 340 B.R. 411 (Bankr. D. Utah 2006).

17. *In re Jass*, 340 B.R. at 414, 417–18.

18. See *infra* notes 30–32 and accompanying text for a discussion of pre-BAPCPA practices. See *infra* Parts III.A.2–5 for a discussion of the majority's manipulation of BAPCPA to achieve the desired result of using anticipated income.

II. BAPCPA'S NEW DEFINITION OF INCOME CREATES TWO DIAMETRICALLY OPPOSED INTERPRETATIONS AMONG COURTS

A. BAPCPA Is Leading to a Split Among Courts

When Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[19] on October 17, 2005, it intended "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors."[20] Its enactment, however, caused a split among courts in the requirements for confirmation of plans in Chapter 13 bankruptcy cases.[21] Some courts and commentators credit this split to BAPCPA being a "poorly written statute"[22] as a result of lobbyists, instead of bankruptcy professionals, drafting it.[23] While BAPCPA sought to limit judicial discretion, the poor drafting requires much judicial discretion simply to interpret the statute.[24]

Specifically, interpretation of § 1325(b) requires substantial judicial discretion because § 1325(b)'s ambiguity created a split among courts.[25] This section provides that if the trustee or a creditor files an objection to the confirmation of a debtor's plan then the debtor, unless paying all unsecured creditors in full, must provide the entire "*projected disposable income*" received in the applicable commitment period.[26] The split among courts arises because §

19. Pub. L. No. 109-8, 119 Stat. 23 (codified in 11 U.S.C. and scattered sections of 12, 18, and 28 U.S.C.).

20. H.R. REP. NO. 109-31, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

21. *See* Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 307–08 (B.A.P. 1st Cir. 2006) (recognizing that inconsistencies in BAPCPA language created two conflicting interpretations of same provision among courts). Chapter 13 is the provision of Title 11 that allows individual debtors with regular income to adjust their debts through a repayment plan. 11 U.S.C. §§ 1301–1330 (2006 & Supp. I 2007).

22. Fokkena v. Hartwick, 373 B.R. 645, 652 (D. Minn. 2007); *see also* Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 97 (noting "[t]here are typos, sloppy choices of words, hanging paragraphs, and inconsistencies" (footnotes omitted)).

23. Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 191–92 (2005) (noting that bankruptcy experts drafted previous amendments to Title 11 and that BAPCPA drafters refused to make technical corrections to statute).

24. *See id.* at 192–93 (noting intent to limit judicial discretion and predicting requirement of more judicial discretion).

25. *See, e.g.*, *In re* Hardacre, 338 B.R. 718, 722–23 (Bankr. N.D. Tex. 2006) (using much judicial discretion to interpret § 1325(b)). *See generally* Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 220–24 (2007) (discussing split among courts with regard to § 1325(b)).

26. 11 U.S.C. § 1325(b)(1)(B) (emphasis added). Section 1325(b)(1)(B) provides that:

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan . . . the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Id. BAPCPA defines the "applicable commitment period" as three years or five years, depending

1325(b) only defines "disposable income" and does not define "projected disposable income."[27] Not only does the statute not define "projected disposable income," but it defines "disposable income" using a historical calculation of income.[28] The split among courts focuses on reconciling the definition of "disposable income" in § 1325(b)(2) with the term "projected" in § 1325(b)(1)(B) to determine how to calculate projected disposable income.[29]

Section 1325(b), before the enactment of BAPCPA, defined "disposable income" as "income which is received by the debtor and which is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependant [sic] of the debtor."[30] Notably, prior to BAPCPA, § 1325(b)(1)(B) contained the term "projected disposable income" and did not define it.[31] Before

upon whether a debtor's "current monthly income," defined at *id.* § 101(10A)(A)(i), is above or below the applicable median income for the debtor's household size and state. *Id.* § 1325(b)(4); *see also* Alane A. Becket & Thomas A. Lee, III, *Applicable Commitment Period: Time or Money?*, 25-2 AM. BANKR. INST. J. 16, 45 (2006) (discussing split among courts regarding whether "applicable commitment period" is temporal or monetary requirement).

27. 11 U.S.C. § 1325(b)(2); *accord In re* Lanning, No. 06-41037, 2007 Bankr. LEXIS 1639, at *12 (Bankr. D. Kan. May 15, 2007) (stating that BAPCPA does not define "projected disposable income," but does define "disposable income"), *aff'd*, 380 B.R. 17, 19 (B.A.P. 10th Cir. 2007), *aff'd*, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008).

28. The pertinent part of the statute defining "disposable income" is: "For purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . ." 11 U.S.C. § 1325(b)(2). "The term 'current monthly income'—(A) means the average income from all sources that the debtor receives . . . during the 6-month period ending on—(i) the last day of the calendar month immediately preceding the date of the commencement of the case . . . ." *Id.* § (10A)(A)(i). For purposes of this Comment, "historical income" or "historical calculation of income" are synonymous with the statutory term "current monthly income" and its definition in § 101(10A). This Comment classifies any other method of calculation of income as "anticipated income." At least one commentator predicted that courts would have difficulty with the relationship between "disposable income" and "projected disposable income." *See* Sommer, *supra* note 23, at 193–94, 221–22 (noting that historical and actual income can be significantly different and predicting that issues will arise with reconciliation of term "projected" with definition of "disposable income").

29. *See, e.g.*, Pak v. eCast Settlement Corp. (*In re* Pak), 378 B.R. 257, 268 (B.A.P. 9th Cir. 2007) (Klein, J., concurring) (defining split as "classic paradox"), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 874 (9th Cir. 2008); *In re* Alexander, 344 B.R. 742, 748 (Bankr. E.D.N.C. 2006) (noting that question arises from historical calculation of income in definition of "disposable income" when calculating "projected disposable income"); *In re Hardacre*, 338 B.R. at 722 (recognizing that "projected disposable income" is subject to conflicting interpretations given definition of "disposable income"). See *infra* Parts II.B–C for a discussion of the two viewpoints regarding projected disposable income.

30. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 307 (B.A.P. 1st Cir. 2007) (quoting 11 U.S.C. § 1325(b)(2) (prior to amendment by BAPCPA)).

31. *Kibbe*, 361 B.R. at 307. The Ninth Circuit Court of Appeals, in finding for the use of historical income, noted that the statute linked "projected disposable income" to "disposable income" before BAPCPA and pointed out that "[a]ny change in how 'projected disposable income' is calculated only reflects the changes dictated by the new 'disposable income' calculation; it does not change the relationship of 'projected disposable income' to 'disposable income.'" *Kagenveama*, 541 F.3d at 873.

BAPCPA, courts calculated projected disposable income by subtracting a debtor's actual expenses from a debtor's actual net income.[32]

In order to resolve the meaning of "projected disposable income" in § 1325 under BAPCPA, courts rely upon a statutory interpretation of this section in its entirety[33] and other pertinent sections of Title 11.[34] In executing statutory interpretation, courts must begin with an examination of the statutory language[35] and the inquiry must "presume that [the] legislature says in a statute what it means."[36] To execute statutory interpretation, "the . . . canon[s] of statutory interpretation require[]" courts to begin with the plain meaning of the text and end with that meaning, unless the meaning is ambiguous.[37] Determining plain meaning requires that courts review all statutory provisions and objectives.[38] If words have more than one reasonable meaning, then courts must review "the policies, principles and purposes underlying the statute" without rendering any portion of the statute "superfluous, void, or insignificant"[39] and without causing an absurd result.[40] If ambiguity exists, then courts must take a holistic view of the entire statute.[41]

32. *E.g.*, *Kibbe*, 361 B.R. at 307; *accord Pak*, 378 B.R. at 262 (noting that pre-BAPCPA courts calculated projected disposable income by subtracting actual expenses from actual income). Courts calculated actual income using Schedule I, pursuant to § 521(a)(1)(B)(ii), which requires reporting current income, as well as other evidence of actual income if courts considered Schedule I to be inaccurate. *Kibbe*, 361 B.R. at 307 n.5.

33. *See, e.g.*, *In re Hardacre*, 338 B.R. at 722–23 (interpreting § 1325 in its entirety). Notably, courts on each side of the split rely upon the same language in § 1325 to determine the meaning of projected disposable income. *Compare In re Alexander*, 344 B.R. at 749 (relying upon § 1325(b) to determine use of historical income), *with In re Hardacre*, 338 B.R. at 723 (relying upon § 1325(b) to determine use of anticipated income).

34. Other pertinent sections of Title 11 include, among others, §§ 101(10A), 521, 707(b)(2)(B), 1129(a)(15), 1323, and 1329. *See, e.g.*, *In re* Berger, 376 B.R. 42, 47 (Bankr. M.D. Ga. 2007) (using § 1129(a)(15)); *In re* Arsenault, 370 B.R. 845, 851 (Bankr. M.D. Fla. 2007) (relying on § 521); *In re* Zimmerman, No. 06-31086, 2007 Bankr. LEXIS 410, at *20 (Bankr. W.D. Ohio Jan. 29, 2007) (employing §§ 1323 and 1329); *In re* Jass, 340 B.R. 411, 418 (Bankr. D. Utah 2006) (using § 707(b)(2)(B)). See *infra* Parts II.B.3, C.2–3 for discussions regarding the use of other sections of Title 11 to determine the meaning of projected disposable income.

35. *In re* Brady, 361 B.R. 765, 771 (Bankr. D.N.J. 2007) (citing Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004)); *see also* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (stating that interpretation begins with statutory language itself).

36. *In re* Clemons, 404 B.R. 577, 580 (Bankr. N.D. Ga. 2006) (quoting BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004)).

37. *Id.* (quoting *BedRoc Ltd.*, 541 U.S. at 183).

38. *Id.* (quoting Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 221 (1986)).

39. *Id.* at 580, 581 (quoting Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. #1 (*In re* Thinking Machs. Corp.), 67 F.3d 1021, 1025 (1st Cir. 2005); Duncan v. Walker, 533 U.S. 167, 174 (2001)).

40. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 313 (B.A.P. 1st Cir. 2007) (quoting Gen. Motors Corp. v. Darlings, 444 F.3d 98, 108 (1st Cir. 2006)).

41. *In re Clemons*, 404 B.R. at 581 (citing United States v. Boisdore, 49 U.S. (8 How.) 113, 122 (1849)).

B. The Majority Courts' Argument That BAPCPA Requires the Use of Anticipated Income to Calculate Projected Disposable Income[42]

A majority of courts find that BAPCPA requires the use of anticipated income to calculate projected disposable income.[43] Following this approach, these courts recognize the negative effects that can occur if debtors solely use historical income to calculate projected disposable income.[44] For example, when using historical income, an anticipation of an increase in income in the future provides debtors with a "strong incentive" to file for bankruptcy quickly because then the debtors use the lower historical income figure to calculate projected disposable income.[45] The use of historical income, however, also requires debtors receiving a lower income after filing for bankruptcy to commit to the projected disposable income calculated with the higher historical income figure.[46] In searching for a resolution to these apparent problems, courts perform a statutory construction analysis that defines the term "projected" in § 1325(b)(1)(B), relies upon other provisions in § 1325(b), and looks to other sections of Chapter 13 and other chapters of Title 11 to support the use of anticipated income.

42. *See In re* Berger, 376 B.R. 42, 46 (Bankr. M.D. Ga. 2007) (noting that use of anticipated income is majority view).

43. *E.g.*, *Kibbe*, 361 B.R. at 312 (finding that BAPCPA requires use of anticipated income to calculate "projected disposable income"); *In re* Hardacre, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006) (calculating "projected disposable income" using anticipated income, not historical income). While the majority courts find that "projected disposable income" requires the use of anticipated income, these courts also realize that this interpretation cannot render the definition of "disposable income" meaningless. *See Kibbe*, 361 B.R. at 312 (noting that Congress intended to exclude certain types of income in definition of "disposable income"). In order to do this, the calculation of anticipated income must exclude the income exclusions listed in the definition of "current monthly income" in § 101(10A)(B). *Id.* (finding for use of anticipated income less income exclusions listed in § 101(10A)(B)); *accord In re* McCarty, 376 B.R. 819, 824–25 (Bankr. N.D. Ohio 2007) (agreeing with *Kibbe* that anticipated income should not include income exclusions from § 101(10A)(B)); *In re* Lanning, No. 06-41037, 2007 Bankr. LEXIS 1639, at *19 n.21 (Bankr. D. Kan. May 15, 2007) (agreeing with *Kibbe* that anticipated income cannot include income exclusions), *aff'd*, 380 B.R. 17 (B.A.P. 10th Cir. 2007), *aff'd*, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008). Income exclusions include "benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity . . . and payments to victims of international terrorism . . . or domestic terrorism." 11 U.S.C. § 101(10A)(B) (2006 & Supp. I 2007).

44. *See, e.g.*, *In re Hardacre*, 338 B.R. at 722 (recognizing that serious consequences can occur in some cases if debtors strictly use historical income).

45. *Id.* Through the timing of the filing, a debtor can manipulate the "current monthly income" figure. Henry Hildebrand, III, *Unintended Consequences: BAPCPA and the New Disposable Income Test*, 25 AM. BANKR. INST. J. 14, 54 (2006); *accord In re* Moore, 367 B.R. 721, 724 (Bankr. D. Kan. 2007) (recognizing that historical income allows debtors to manipulate income through control timing of filing); *In re* Riggs, 359 B.R. 649, 651–52 (Bankr. E.D. Ky. 2007) (noting that historical income allows manipulation by debtors).

46. *In re Hardacre*, 338 B.R. at 722; *see also In re* Jass, 340 B.R. 411, 417 (Bankr. D. Utah 2006) (recognizing that use of historical income may foreclose some otherwise eligible debtors from relief under Chapter 13).

1. The Majority Courts Define the Term "Projected" in § 1325(b)(1)(B)

Some courts focus on the term "projected" in § 1325(b)(1)(B),[47] presuming that "Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."[48] These courts stress that an interpretation cannot simply ignore the term "projected" because ignoring "projected" renders it superfluous.[49] Further, some courts note that an interpretation cannot minimize Congress's insertion of "projected"[50] because if Congress intended for "projected disposable income" and "disposable income" to be synonymous, it would have omitted "projected" from § 1325(b)(1)(B).[51] By reasoning that Congress included "projected" in § 1325(b)(1)(B) and excluded the term in the definition of "disposable income" in § 1325(b)(2), these courts find that "projected disposable income" must differ from "disposable income."[52]

To determine how significant an interpretation they must give to "projected," some courts look to its definition: "to calculate, estimate, or predict (something in the future), based on present data or trends."[53] Thus, by definition, these courts determine that "'projected' is a forward-looking term."[54] Some courts then rely upon Congress's placement of the forward-looking term "projected" next to "disposable income," finding that it modifies "disposable income"[55] and further defines the "disposable income" required from a debtor.[56] These courts find that this construction is the only way to give the term

47. *E.g.*, *In re Hardacre*, 338 B.R. at 722 (beginning statutory interpretation with term "projected"). *Hardacre*, as the first published opinion on this issue, inspired many courts to follow its method of interpretation. *See, e.g.*, *In re* Kibbe, 342 B.R. 411, 414 (Bankr. D.N.H. 2006) (relying upon term "projected" in statutory interpretation and agreeing with *Hardacre* opinion), *aff'd sub nom.* Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302 (B.A.P. 1st Cir. 2007); *In re Jass*, 340 B.R. at 415–16 (looking to definition of term "projected" in interpretation).

48. *In re Hardacre*, 338 B.R. at 723 (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1993)).

49. *See, e.g.*, *In re* Lanning, No. 06-41037, 2007 Bankr. LEXIS 1639, at *19 (Bankr. D. Kan. May 15, 2007) (giving meaning to "projected" by noting that another bankruptcy form, Schedule I, requires debtors to note any anticipated income changes), *aff'd*, 380 B.R. 17 (B.A.P. 10th Cir. 2007), *aff'd*, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008).

50. *In re Lanning*, 2007 Bankr. LEXIS 1639, at *20.

51. *In re Kibbe*, 342 B.R. at 414.

52. *See, e.g.*, Pak v. eCast Settlement Corp. (*In re* Pak), 378 B.R. 257, 262–63 (B.A.P. 9th Cir. 2007) (finding that addition of term "projected" in § 1325(b)(1)(B) distinguishes it from "disposable income" in § 1325(b)(2)), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 874 (9th Cir. 2008); *In re Hardacre*, 338 B.R. at 723 (relying upon term "projected" to determine that BAPCPA requires use of anticipated income).

53. *In re* Jass, 340 B.R. 411, 415 (Bankr. D. Utah 2006) (quoting THE AMERICAN HERITAGE COLLEGE DICTIONARY 1115 (4th ed. 2002)).

54. *In re* LaPlana, 363 B.R. 259, 265–66 (Bankr. M.D. Fla. 2007); *see also Pak*, 378 B.R. at 263 (relying upon forward-looking interpretation of "projected" and noting courts used this interpretation pre-BAPCPA); *In re Jass*, 340 B.R. at 415–16 (relying upon this definition).

55. *In re* Arsenault, 370 B.R. 845, 850 (Bankr. M.D. Fla. 2007); *In re* Devilliers, 358 B.R. 849, 858 (Bankr. E.D. La. 2007); *In re Jass*, 340 B.R. at 415–16.

56. *In re* Casey, 356 B.R. 519, 522 (Bankr. E.D. Wash. 2006).

"projected" "independent significance" in § 1325(b)(1)(B),[57] and conclude that BAPCPA requires consideration of anticipated income.[58]

At least one court finding for the use of anticipated income found that if an interpretation applies a historical income calculation to "projected," an unrealistic assumption arises that a debtor's income will not change during the term of the bankruptcy.[59] Further, courts recognize that reliance solely on historical income renders the term "projected" surplusage because use of historical income fails to consider the plain, forward-looking meaning of "projected" and, thus, future changes to income.[60] In order to give meaning to "projected," these courts find that BAPCPA requires consideration of both increases and decreases in anticipated income as compared to historical income.[61]

2. The Majority Courts Rely upon Other Provisions in § 1325(b)

a. "To Be Received"

The phrase "to be received" in § 1325(b)(1)(B) receives scrutiny by some majority courts. Section 1325(b)(1)(B) requires that a debtor devote all "projected disposable income *to be received* in the applicable commitment period."[62] Some courts argue that if projected disposable income is based solely on the debtors' historical income, then the phrase "to be received" becomes moot.[63] In an effort to give this phrase meaning, these courts infer that Congress intended for the use of anticipated income in the calculation of projected disposable income.[64] One court referenced the connection between the phrase

57. *In re* Grant, 364 B.R. 656, 665 (Bankr. E.D. Tenn. 2007) (quoting *In re Jass*, 340 B.R. at 416); *accord In re* Chriss-Price, 376 B.R. 648, 651 (Bankr. M.D. Tenn. 2006) (recognizing that interpretation must give term "projected" meaning).

58. *E.g.*, *In re Jass*, 340 B.R. at 416 (finding that BAPCPA requires consideration of anticipated income if actual income varies from historical income).

59. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 312 (B.A.P. 1st Cir. 2007).

60. *Id.* at 312; *In re* Lanning, No. 06-41037, 2007 Bankr. LEXIS 1639, at *19 (Bankr. D. Kan. May 15, 2007), *aff'd*, 380 B.R. 17 (B.A.P. 10th Cir. 2007), *aff'd*, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008); *In re* Demonica, 345 B.R. 895, 900 (Bankr. N.D. Ill. 2006) (noting that Supreme Court is reluctant to render any statutory term as surplusage (citing Duncan v. Walker, 533 U.S. 167, 174 (2001))); *In re* Clemons, 404 B.R. 577, 581 (Bankr. N.D. Ga. 2006).

61. *E.g.*, *In re* LaPlana, 363 B.R. 259, 266 (Bankr. M.D. Fla. 2007) (finding that forward-looking term mandates that courts consider any changes in income).

62. 11 U.S.C. § 1325(b)(1)(B) (2006 & Supp. I 2007) (emphasis added).

63. *In re* Hardacre, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006); *see also In re Lanning*, 2007 Bankr. LEXIS 1639, at *19 (recognizing risk of superfluous statutory text if historical income is used); *In re Clemons*, 404 B.R. at 581 (noting that anticipated income interpretation of phrase "to be received" prevents superfluous statutory text); *In re* Kibbe, 342 B.R. 411, 414 (Bankr. D.N.H. 2006) (concurring with *Hardacre* that "to be received" is superfluous if income is based only on historical income), *aff'd sub nom*. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302 (B.A.P. 1st Cir. 2007).

64. *In re Hardacre*, 338 B.R. at 723; *accord In re* Arsenault, 370 B.R. 845, 850 (Bankr. M.D. Fla. 2007) (agreeing with *Hardacre*); *In re* Grant, 364 B.R. 656, 666 (Bankr. E.D. Tenn. 2007) (acknowledging importance of all terms, including "to be received," in § 1325(b)(1)(B)); *In re* Riggs,

"projected disposable income" and the phrase "applicable commitment period" that follows "to be received."[65] Section 1325(b)(1)(B) provides that the "applicable commitment period" "begin[s] on the date that the first payment is due under the plan."[66] To this court, this definition relates "projected disposable income" to the date of the first payment of the plan, not the date of the petition, allowing the court to conclude that "projected disposable income" requires debtors to pay anticipated income during the term of the plan.[67]

b. "As of the Effective Date of the Plan"

Some of the majority courts scrutinize the phrase "as of the effective date of the plan" that appears in § 1325(b)(1).[68] To these courts, this language suggests that the calculation of a debtor's income occurs at the effective date of the plan and not from the six-month period prior to filing.[69] One court argues that the phrase "specifically directs the timing [of a] court's inquiry."[70] Another court relies on the fact that the use of historical income may result in an income figure with little, or without any, basis in reality as of the effective date of the plan,

359 B.R. 649, 652 (Bankr. E.D. Ky. 2007) (agreeing with *Hardacre*); *In re* Zimmerman, No. 06-31086, 2007 Bankr. LEXIS 410, at *20 (Bankr. N.D. Ohio Jan. 29, 2007) (determining that *Hardacre*'s reasoning is persuasive); *In re* Devilliers, 358 B.R. 849, 858 n.8 (Bankr. E.D. La. 2007) (stating that phrase "to be received" signifies future income); *In re* Fuller, 346 B.R. 472, 478, 482 (Bankr. S.D. Ill. 2006) (concurring with *Hardacre*); *In re Clemons*, 404 B.R. at 581 (recognizing that "to be received" requires use of anticipated income); *In re Kibbe*, 342 B.R. at 414 (finding that phrase "to be received" is forward-looking and requires use of anticipated income).

65. *In re Arsenault*, 370 B.R. at 850.

66. 11 U.S.C. § 1325(b)(1)(B). See *supra* note 26 for the definition of "applicable commitment period."

67. *In re Arsenault*, 370 B.R. at 850; *see also In re Grant*, 364 B.R. at 666 (citing *In re* LaPlana, 363 B.R. 259, 266 (Bankr. M.D. Fla. 2007)) (recognizing that courts should calculate "projected disposable income" on date they confirm debtor's Chapter 13 plan, which is same date they assess whether debtor conforms to § 1325).

68. Section 1325(b)(1) provides that, upon objection, "the court may not approve the plan unless, *as of the effective date of the plan*," the plan provides all "projected disposable income." 11 U.S.C. § 1325(b)(1)(B) (emphasis added).

69. *In re Hardacre*, 338 B.R. at 723; *accord* Pak v. eCast Settlement Corp. (*In re* Pak), 378 B.R. 257, 265 (B.A.P. 9th Cir. 2007) (stating that "effective date of the plan" occurs at confirmation, which is typically months after petition date; therefore, any use of debtor's prior-to-petition income to determine "projected disposable income to be received in the applicable commitment period" leads to inaccuracies in projected income), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 874 (9th Cir. 2008); *In re* Lanning, No. 06-41037, 2007 Bankr. LEXIS 1639, at *19 (Bankr. D. Kan. May 15, 2007) (noting "as of the effective date of the plan" requirement), *aff'd*, 380 B.R. 17 (B.A.P. 10th Cir. 2007), *aff'd*, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008); *In re Grant*, 364 B.R. at 666 (acknowledging importance of "as of the effective date of the plan" in § 1325(b)(1)); *In re* Upton, 363 B.R. 528, 534 (Bankr. S.D. Ohio 2007) (stating that "as of the effective date of the plan" specifically directs courts to use anticipated income); *In re Riggs*, 359 B.R. at 652 (agreeing with *Hardacre*); *In re LaPlana*, 363 B.R. at 266 (noting that "key-date" to calculate "projected disposable income" is time of confirmation); *In re Kibbe*, 342 B.R. at 414 (stating income "as of the effective date of the plan" is relevant to calculation of "projected disposable income").

70. *In re Upton*, 363 B.R. at 534 (recognizing that debtor is also under duty to amend current income statement if change occurs).

which presumably renders the phrase "as of the effective date of the plan" superfluous.[71] On this basis, these courts conclude that "projected disposable income" refers to anticipated income over the duration of the plan.[72]

3. The Majority Courts Look to Other Sections in Chapter 13 and Other Chapters of Title 11

a. The Majority Courts Rely upon Provisions for Pre- and Post-Confirmation Modification

Some of the majority courts, in construing the meaning of "projected disposable income," look to §§ 1323 and 1329 of Title 11, which allow debtors to modify the Chapter 13 plan before or after confirmation.[73] Sections 1323 and 1329 indicate, as one court noted, the flexibility retained under BAPCPA when debtors confront unforeseen circumstances during the term of the bankruptcy.[74] As another court noted,

> [i]f the measure of the debtor's required commitment of "projected disposable income" to plan payments is a mere multiple of the historical calculation of "disposable income" under §§ 1325(b)(2) and (3), what principled basis is there for allowing a debtor to modify a plan to reduce plan payments based on a postpetition reduction in debtor's income?[75]

Courts in the majority agree that there would be no basis, rendering §§ 1323 and 1329 mere surplusage under a historical calculation of income.[76]

71. *See In re* Zimmerman, No. 06-31086, 2007 Bankr. LEXIS 410, at *10 (Bankr. N.D. Ohio Jan. 29, 2007) (noting that use of historical income contradicts with phrase "as of the effective date of the plan" and creates interpretative difficulties).

72. *E.g.*, *In re Kibbe*, 342 B.R. at 414; *In re Hardacre*, 338 B.R. at 723.

73. 11 U.S.C. §§ 1323, 1329 (2006 & Supp. I 2007); *Pak*, 378 B.R. at 267–68 (finding that if "projected disposable income" and "disposable income" are synonymous, then BAPCPA prohibits plan modifications); *In re* Briscoe, 374 B.R. 1, 16 (Bankr. D.D.C. 2007); *In re* Mullen, 369 B.R. 25, 33 (Bankr. D. Or. 2007); *In re Zimmerman*, 2007 Bankr. LEXIS 410, at *19; *In re* Risher, 344 B.R. 833, 837 (Bankr. W.D. Ky. 2006); *In re* Grady, 343 B.R. 747, 752 (Bankr. N.D. Ga. 2006); *accord Pak*, 378 B.R. at 272 (Klein, J., concurring) (finding support for use of anticipated income in postconfirmation modifications). The pertinent provision for preconfirmation modification in § 1323 provides that "[t]he debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1322 of this title." 11 U.S.C. § 1323(a). For postconfirmation modifications, the pertinent part of § 1329 provides "[a]t any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to . . . increase or reduce the amount of payments." *Id.* § 1329(a)(1).

74. *In re Grady*, 343 B.R. at 752 (noting that Congress did not abrogate modification and actually expanded it).

75. *In re Mullen*, 369 B.R. at 33.

76. *See In re* McCarty, 376 B.R. 819, 825 (Bankr. N.D. Ohio 2007) (stating that use of historical income, by making debtors' payments fixed, renders § 1329 meaningless); *In re Mullen*, 369 B.R. at 33 (stating that use of historical income renders § 1329 moot); *In re Grady*, 343 B.R. at 752 (noting that use of historical income prevents utilization of §§ 1323 and 1329, which Congress did not delete in BAPCPA). *Contra* Amended Chapter 13 Plan at 35, *In re* Corcoran, No. 07-14768 (Bankr. D. Mass.

Additionally, some courts note the senselessness of permitting modification based upon a change in future circumstances, but "not to provide for a realistic determination of the debtor's ability to make payments in the first place."[77]

b. The Majority Courts Rely upon the "Special Circumstances" Provision in § 707 to Allow Modification of Historical Income[78]

Some majority courts, in construing the meaning of "projected disposable income," apply § 707(b)(2)(B)'s "special circumstances" provision to Chapter 13 debtors to support the use of anticipated income.[79] BAPCPA requires Chapter 7 debtors to pass the means test to determine if abuse exists.[80] If the presumption of abuse arises, debtors may rebut that presumption pursuant to § 707(b)(2)(B).[81] Section 707(b)(2)(B)'s provision to rebut the presumption of abuse applies to changes in income and expenses for Chapter 7 debtors[82] and at least one court argues that the "special circumstances" provision does not embrace historical income as tightly as § 1325 appears to embrace it.[83] This provision relates to Chapter 13 cases in two ways. First, both § 707 and § 1325 reference "current monthly income," or historical income.[84] Second, § 1325(b)(3)

Jan. 22, 2008) (amending plan prior to confirmation to change length of plan from thirty-six months to sixty months); First Amended Chapter 13 Plan at 16, *In re* Ferguson, No. 07-20979 (Bankr. S.D. Fla. Jan. 14, 2008) (amending plan prior to confirmation to surrender secured item); First Amended Chapter 13 Plan at 11, *In re* Garcia, No. 07-44319 (Bankr. N.D. Cal. Jan. 11, 2008) (amending plan preconfirmation to surrender secured item).

77. *In re Zimmerman*, 2007 Bankr. LEXIS 410, at *20; *accord In re Briscoe*, 374 B.R. at 16 (concurring with *Zimmerman*).

78. Some courts find that this position is a third interpretation that is separate and distinct from other courts that rely upon the use of anticipated income due to the use of historical income if "special circumstances" do not apply. *See, e.g.*, *In re* Featherston, No. 07-60296-13, 2007 WL 2898705, at *9 (Bankr. D. Mont. Sept. 28, 2007) (noting that *Hardacre* and *Jass* represent two separate views). This Comment classifies this position as part of the broader position relying upon the use of anticipated income.

79. *E.g.*, *In re* Jass, 340 B.R. 411, 418 (Bankr. D. Utah 2006) (looking to § 707(b)(2)(B) for support to adjust historical income).

80. 11 U.S.C. § 707(b)(1) (2006 & Supp. I 2007). Chapter 7 is the portion of Title 11 that allows individual debtors and businesses to liquidate assets to repay debts. *Id.* §§ 701–784.

81. "[T]he presumption of abuse may only be rebutted by demonstrating special circumstances . . . to the extent such special circumstances . . . justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." *Id.* § 707(b)(2)(B)(i). This section further provides:

> In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide—(I) documentation for such expense or adjustment to income; and (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

Id. § 707(b)(2)(B)(ii)(I)–(II).

82. *Id.* § 707(b)(2)(B).

83. *In re* Clemons, 404 B.R. 577, 582 (Bankr. N.D. Ga. 2006).

84. 11 U.S.C. §§ 707(b)(2)(A)(i), 1325(b)(2).

instructs Chapter 13 debtors to determine expenses in accordance with § 707(b)(2)(A) and (B).[85]

Some courts apply the "special circumstances" provision for Chapter 13 debtors' income without questioning its actual applicability.[86] Thus, these courts require a debtor, seeking to show a substantial change in anticipated income compared to historical income, to present documentation as required under § 707(b)(2)(B).[87] Some courts note, however, that Chapter 13 debtors should only use § 707(b)(2)(B) for the adjustment of expenses because § 1325(b)(3)'s reference to §§ 707(b)(2)(A) and (B) is only in the context of expenses.[88] Another court found that the "special circumstances" provision applies to Chapter 13 debtors for both income and expenses, but only debtors, not trustees or creditors, may invoke it.[89]

One court noted that the issue arises of whether Congress intentionally omitted similar statutory language applicable to Chapter 13 debtors.[90] Another court noted two possibilities to address this issue.[91] First, the court recognized the possibility that Congress intended for it to be harder to qualify for relief under Chapter 13 than Chapter 7.[92] Second, the court noted that Congress "recognized that the projection of the debtor's income for purposes of § 1325(b)(1) would already take into account 'special circumstances' warranting 'adjustments of current monthly income' because the projection would be a

85. *Id.* § 1325(b)(3). Section 1325(b)(3) provides that "amounts reasonably necessary to be expended under [the definition of 'disposable income' in § 1325(b)(2)] shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)." 11 U.S.C. § 1325(b)(3). Section 1325(b)(3) only references the use of § 707(b)(2)(A) and (B) for above-median-income debtors. *Id.* § 1325(b)(3)(A), (B), (C). See *supra* note 26 for a definition of above- and below-median-income debtors.

86. *In re* Mancl, 375 B.R. 514, 516–17 (Bankr. W.D. Wis. 2007), *rev'd sub nom.* Mancl v. Chatterton (*In re* Mancl), 381 B.R. 537, 543 (W.D. Wis. 2008); *In re* Moore, 367 B.R. 721, 726 (Bankr. D. Kan. 2007); *In re* Teixeira, 358 B.R. 484, 487 (Bankr. D.N.H. 2006); *see also* Pak v. eCast Settlement Corp. (*In re* Pak), 378 B.R. 257, 271 (B.A.P. 9th Cir. 2007) (Klein, J., concurring) (stating that "special circumstances" provision is at least plausible, but not perfect, interpretation for use of anticipated income), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 874 (9th Cir. 2008); Waldron & Berman, *supra* note 25, at 222 (noting that there is failure to provide standard of proof to overcome presumption).

87. *In re Moore*, 367 B.R. at 726; *In re Teixeira*, 358 B.R. at 487; *In re* Jass, 340 B.R. 411, 418 (Bankr. D. Utah 2006).

88. *In re* Briscoe, 374 B.R. 1, 17 (Bankr. D.D.C. 2007); *see also In re* Pederson, No. 06-00635S, 2006 Bankr. LEXIS 2725, at *6–7 (Bankr. N.D. Iowa Oct. 13, 2006) (applying to expenses only, but not explicitly stating that it does not apply to income). *Contra Pak*, 378 B.R. at 272 (Klein, J., concurring) (noting that § 1325(b)(3) refers only to expenses, but finding that if Congress intended "special circumstances" to apply only to expenses, § 1325(b)(3) would reference only § 707(b)(2)(A), not § 707(b)(2)(B)).

89. *In re* Ries, 377 B.R. 777, 784–85 (Bankr. D.N.H. 2007) (finding that Chapter 13 debtors can use § 707(b)(2)(B) in same manner as Chapter 7 debtors but that, because debtors bear burden of proof for "special circumstances," only debtors can invoke it).

90. *In re* Clemons, 404 B.R. 577, 582 (Bankr. N.D. Ga. 2006).

91. *In re Briscoe*, 374 B.R. at 17–18.

92. *Id.* (noting that this possibility is nonsensical given that Congress expressed preference for debtor to repay maximum that debtor can afford).

forecast of the debtor's future income, not a calculation based on his past income."[93] A second court noted one senator's perception that the absence of the "special circumstances" provision for Chapter 13 debtors was simply an oversight.[94] Thus, courts cannot reach a consensus regarding the extent to which § 707(b)(2)(B)'s "special circumstances" provision applies to Chapter 13 debtors. Notably, many courts apply a "test" similar to the "special circumstances" provision, but fail to attribute it to § 707(b)(2)(B).[95]

c. One Majority Court Looks to the Definition of "Current Monthly Income"

While almost all courts view the definition of "current monthly income" as a fixed historical figure that debtors cannot adjust,[96] at least one court found that current monthly income is not solely historical.[97] While courts typically focus on § 101(10A)(A)(i)'s definition, this court recognizes that there is a second definition in subpart (ii) of § 101(10A)(A).[98] The definition under subpart (i) requires the determination of current monthly income from "the last day of the calendar month immediately preceding the date" of filing.[99] The definition under subpart (ii) allows the calculation of current monthly income using "the date on which current income is determined by the court."[100] Subpart (i)'s definition applies when a debtor files the appropriate schedule to determine current income and subpart (ii)'s definition applies only if a debtor fails to file this schedule.[101] This court argues that by taking postpetition income into account in the definition under subpart (ii) of § 101(10A)(A), Congress actually intended to

93. *Id.* at 18.

94. *In re Clemons*, 404 B.R. at 582 (quoting 151 CONG. REC. S2315 (daily ed. Mar. 9, 2005) (statement of Sen. Feingold)) (noting that Senator proposed amendments to include "special circumstances" provision for Chapter 13 debtors, but later withdrew amendments).

95. *See, e.g.*, Pak v. eCast Settlement Corp. (*In re* Pak), 378 B.R. 257, 267 (B.A.P. 9th Cir. 2007) (finding that if "interpretation of 'projected disposable income' is not to degenerate into absurdity, deriving 'projected disposable income' from 'disposable income' must be subject to the presentation of contrary evidence"), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 874 (9th Cir. 2008); Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 312 (B.A.P. 1st Cir. 2007) (holding that BAPCPA requires use of anticipated income if it is not identical to historical income without any discussion of "special circumstances"); *In re* Brady, 361 B.R. 765, 774 (Bankr. D.N.J. 2007) (finding that BAPCPA requires use of historical income, unless debtor anticipates foreseeable change); *In re* Chriss-Price, 376 B.R. 648, 651–52 (Bankr. M.D. Tenn. 2006) (following *Jass*'s "special circumstances" method, but failing to attribute that method to § 707(b)(2)(A)).

96. *E.g.*, *In re* Jass, 340 B.R. 411, 415 (Bankr. D. Utah 2006) (recognizing that to determine "current monthly income," courts should look to time period preceding bankruptcy); *In re* Hardacre, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006) (stressing that calculation of "current monthly income" uses income received prior to petition date).

97. *See In re Clemons*, 404 B.R. at 581–82 (focusing on definition of "current monthly income" in § 101(10A)(A)(ii)).

98. 11 U.S.C. § 101(10A)(A) (2006 & Supp. I 2007); *In re Clemons*, 404 B.R. at 581–82.

99. 11 U.S.C. § 101(10A)(A)(i).

100. *Id.* § 101(10A)(A)(ii).

101. *Id.* § 101(10A)(A)(i)–(ii); *accord In re Clemons*, 404 B.R. at 581–82 (interpreting § 101(10A)(A)).

use historical income only as a starting point to calculate projected disposable income.[102]

d. Some Majority Courts Look to the Requirements for Submissions of Statements of Future Income and Tax Returns

Section 521(a)(1)(B)(vi) requires debtors, at the court's request, to submit a statement that discloses "any reasonably anticipated increase in income . . . over the 12-month period following the date of the filing of the petition."[103] Similarly, § 521(f) requires debtors to file future income tax returns during the term of the bankruptcy.[104] In order to give meaning and effect to these sections, one court has held that BAPCPA requires the use of anticipated income, noting that "[i]t only makes sense to require debtors to comply with these obligations if the debtors' projected disposable income is tied to income earned in the future."[105] Further, some courts note that if BAPCPA only requires debtors to pay the static figure reached by the strict definition of "disposable income," then these sections do not serve any purpose.[106]

C. The Minority Courts' Argument That BAPCPA Requires the Use of Historical Income to Calculate Projected Disposable Income[107]

A growing minority of courts, including the Ninth Circuit Court of Appeals,[108] find that "projected disposable income" in § 1325(b)(1)(B) is synonymous with "disposable income" in § 1325(b)(2).[109] In reaching this conclusion, these courts focus largely on the plain meaning of the statutory language in § 1325 and refute the majority courts' interpretations of terms and phrases, such as "projected" and "to be received."[110] These courts also review other sections of Title 11 in order to reach this conclusion.[111]

102. *In re Clemons*, 404 B.R. at 582 (noting after this discussion that "special circumstances" provision applies).

103. 11 U.S.C. § 521(a)(1)(B)(vi). Section 521 describes the duties of all debtors under Title 11, including Chapter 13 debtors. *Id.* § 521.

104. *Id.* § 521(f).

105. *In re* Arsenault, 370 B.R. 845, 851 (Bankr. M.D. Fla. 2007).

106. *Id.* (quoting *In re* Davis, 348 B.R. 449, 458 (Bankr. E.D. Mich. 2006)).

107. *See In re* Berger, 376 B.R. 42, 45–46 (Bankr. M.D. Ga. 2007) (noting use of historical income is minority position).

108. *See* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 872 (9th Cir. 2008) (noting that "projected disposable income" and "disposable income" are identical). The Ninth Circuit Court of Appeals is the highest appellate level court thus far to decide this issue.

109. *See, e.g.*, *In re* Kagenveama, No. 05-28079, 2006 Bankr. LEXIS 2759, at *5 (Bankr. D. Ariz. July 10, 2006) (recognizing that definition of "disposable income" does not have meaning unless it applies to "projected disposable income"), *aff'd sub nom*. Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868 (9th Cir. 2008); *In re* Alexander, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006) (noting that if "projected disposable income" and "disposable income" are not linked, then definition of "disposable income" does not have purpose).

110. *E.g.*, *In re* Nance, 371 B.R. 358, 365 (Bankr. S.D. Ill. 2007) (refuting majority interpretation as relying too heavily on word "projected"); *In re* Kolb, 366 B.R. 802, 816–17 & 816 n.19 (Bankr. S.D.

1. The Minority Courts Rely upon Congress's Explicitly Stated Definition of "Disposable Income"

Both "projected disposable income" and the definition of "disposable income" appear in § 1325(b).[112] According to the minority courts, if the definition of "disposable income" does not define "projected disposable income," it is simply a "floating definition" without any purpose.[113] At least one court determined that the definition of "disposable income" following the phrase "'[f]or purposes of this subsection'" in § 1325(b)(2) denotes that the definition applies to § 1325(b) in its entirety, which encompasses the phrase "projected disposable income."[114]

Further, some courts rely upon the fact that Congress did not define "projected disposable income" in this section or the statute[115] and did not provide any other definition of income.[116] One court noted that if Congress intended two separate meanings for these phrases, it would have provided two definitions.[117] Pursuant to this construction, one court, followed by many others, found that to determine projected disposable income, "one simply takes the calculation mandated by § 1325(b)(2) and does the math."[118] In other words, these courts hold that once debtors calculate disposable income according to the statutory definition, the debtors then project the disposable income over the duration of the plan.[119]

Ohio 2007) (giving different meaning than majority courts to term "projected" and phrase "to be received").

111. *E.g.*, *In re* Green, 378 B.R. 30, 37 (Bankr. N.D.N.Y. 2007) (§ 1322); *In re* Hanks, 362 B.R. 494, 500 (Bankr. D. Utah 2007) (§§ 109 and 521), *abrogated by In re* Lanning, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008); *In re* Girodes, 350 B.R. 31, 38 (Bankr. M.D.N.C. 2006) (§§ 541 and 1306).

112. 11 U.S.C. § 1325(b)(1)(B), (b)(2) (2006 & Supp. I 2007). First "projected disposable income" appears in § 1325(b)(1)(B) and then § 1325(b)(2) defines "disposable income." *Id.*

113. *In re Alexander*, 344 B.R. at 749; *accord Kagenveama*, 541 F.3d at 872–73 (opining that "substitution of any data not covered by the § 1325(b)(2) definition in the 'projected disposable income' calculation would render as surplusage the definition of 'disposable income' found in § 1325(b)(2)"); *In re Nance*, 371 B.R. at 364–65 (agreeing with *Alexander*); *In re Kagenveama*, 2006 Bankr. LEXIS 2759, at *5 (recognizing that, unless definition of "disposable income" applies to "projected disposable income," it is meaningless).

114. *In re* Tranmer, 355 B.R. 234, 242 (Bankr. D. Mont. 2006) (using phrase "except as provided in subsection (b)" in § 1325(a) for understanding); *accord In re* Featherston, No. 07-60296-13, 2007 WL 2898705, at *9 (Bankr. D. Mont. Sept. 28, 2007) (repeating reasoning set forth in *Tranmer*).

115. *In re Nance*, 371 B.R. at 365.

116. *See In re* Austin, 372 B.R. 668, 675–76 (Bankr. D. Vt. 2007) (finding no other definition of income except "current monthly income").

117. *In re Nance*, 371 B.R. at 365.

118. *In re Alexander*, 344 B.R. at 749; *accord Kagenveama*, 541 F.3d at 872–73 (noting that "to give meaning to every word of § 1325(b), 'disposable income' must be 'projected' to derive 'projected disposable income'"); *In re* McGillis, 370 B.R. 720, 725 (Bankr. W.D. Mich. 2007) (following *Alexander*); *In re* Kolb, 366 B.R. 802, 814 (Bankr. S.D. Ohio 2007) (finding Congress intended formulaic approach); *In re* Hanks, 362 B.R. 494, 498 (Bankr. D. Utah 2007) (adopting reasoning of *Alexander*), *abrogated by In re* Lanning, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008).

119. *In re Nance*, 371 B.R. at 365; *accord* Coop v. Frederickson (*In re* Frederickson), 375 B.R. 829, 833–35 (B.A.P. 8th Cir. 2007) (finding plain meaning definition of "disposable income" is

a. The Minority Courts Give Meaning to the Term "Projected"

As a result of the minority's reconciliation of the two terms, some minority courts reason that "projected" does not modify the definition of "disposable income," as the majority finds,[120] because that interpretation renders the definition of "disposable income" meaningless.[121] At least one court relied upon the grammatical structure of § 1325(b)(2) by noting the importance of "disposable income" being offset in quotation marks in § 1325(b)(2) to find that "projected disposable income" does not become an undefined, free-standing phrase distinguishable from "disposable income" because it is not offset in quotations.[122] While the majority argues that the use of historical income renders the term "projected" superfluous,[123] the minority finds that the term "projected" acknowledges that "disposable income" only calculates a monthly figure, which the court must then project over the term of the plan.[124] One court notes that it is incorrect to interpret the single word "projected" as a license to include anticipated income when Congress clearly intended to replace a subjective definition with an objective one.[125] Additionally, other courts note that reliance on "projected" to manifest the "'fresh start'" intention of BAPCPA is misplaced[126] because it would be rare if BAPCPA could uniformly establish the "fresh start" principle in every case.[127]

appropriate method to calculate "projected disposable income"), *rev'd*, 545 F.3d 652 (8th Cir. 2008); *In re* Musselman, 379 B.R. 583, 588 (Bankr. E.D.N.C. 2007) (finding that § 1325(b)(1)(B) provides "new computation" of "disposable income," which is then simply "projected out"), *aff'd sub nom.* Musselman v. eCast Settlement Corp., 394 B.R. 801, 820 (E.D.N.C. 2008).

120. See *supra* Part II.B for a discussion of the majority's viewpoint.

121. *See, e.g.*, *In re Kolb*, 366 B.R. at 816 (stating that "dramatic fashion" of modification that some majority courts suggest renders definition of "disposable income" meaningless); *accord* Jeffrey R. Drobish, Note, *The Forbidden Crystal Ball: Interpreting "Projected Disposable Income" for Chapter 13 Bankruptcy Plans After BAPCPA*, 85 WASH. U. L. REV. 185, 208 (2007) (recognizing that use of anticipated income "elevates the word 'projected' in a way that allows bankruptcy courts to pass over BAPCPA's new formulae in favor of the same nuanced methods practiced prior to the 2005 Act").

122. *See In re* Austin, 372 B.R. 668, 677 (Bankr. D. Vt. 2007) (noting that offset of "disposable income" in quotation marks and absence of quotation marks to offset "projected disposable income" supports use of historical income).

123. See *supra* Part II.B.1 for a discussion of the majority courts finding that the term "projected" dictates the use of anticipated income.

124. *In re* Berger, 376 B.R. 42, 46–47 (Bankr. M.D. Ga. 2007); *In re Kolb*, 366 B.R. at 816.

125. *In re* McGillis, 370 B.R. 720, 726 (Bankr. W.D. Mich. 2007) (noting that if Congress removed "projected," it would provide clarity, but recognizing that its presence does not render definition of "disposable income" nonsensical).

126. *In re* Rotunda, 349 B.R. 324, 329, 331 (Bankr. N.D.N.Y. 2006) (recognizing that while judges may not like restrictions imposed by BAPCPA, this does not mean that Congress did not intend to impose those restrictions (citing Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 681 (2005)).

127. *See In re McGillis*, 370 B.R. at 726 (noting that it is rare that legislature's effort results in fairness in each case and recognizing that legislature will overlook some issues). Further, the Ninth Circuit Court of Appeals recognized that that "'projected disposable income' has been linked to the 'disposable income' calculation before BAPCPA. Any change in how 'projected disposable income' is calculated only reflects the changes dictated by the new 'disposable income' calculation; it does not

At least one court recognized that, even if "projected" requires a forward-looking meaning, an interpretation can reject "projected" as "surplusage if [it is] inadvertently inserted or if [it is] repugnant to the rest of the statute."[128] In other words, this court finds that "one word clearly should not be elevated in importance so as to gut an entire statutory scheme enacted by Congress."[129] These courts find that turning to the definition of "disposable income" only for the exclusions from income, as defined in § 101(10A)(B), requires the deletion of significant statutory code in preference of the single word "projected."[130] As one court notes, an interpretation cannot give one word so broad of a meaning that it becomes inconsistent with other statutory language.[131]

b. The Minority Courts Refute the Majority's Interpretation of the Phrase "To Be Received"

Some of the minority courts note that even though the phrase "to be received" could signify the use of anticipated income, as the majority courts find,[132] its general forward-looking meaning is not inconsistent with the use of historical income.[133] These courts reason that the phrase "to be received" only refers to the "projected disposable income" that debtors will receive throughout the duration of the plan, not at the time of confirmation, but in the future.[134]

2. The Minority Courts Look to Statutory Provisions Outside § 1325

Some minority courts turn to provisions outside of § 1325 to support the notion that Congress intended projected disposable income to include a historical calculation of income.[135] For example, § 109(h) requires debtors to complete credit counseling with an analysis of the debtor's budget in the six

change the relationship of 'projected disposable income' to 'disposable income.'" Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 873 (9th Cir. 2008).

128. *In re* Hanks, 362 B.R. 494, 499 (Bankr. D. Utah 2007) (quoting Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004)), *abrogated by In re* Lanning, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008).

129. *In re Hanks*, 362 B.R. at 499; *accord In re* Nance, 371 B.R. 358, 365 (Bankr. S.D. Ill. 2007) (noting that singling out of term "projected" alters definition of "disposable income").

130. *In re Hanks*, 362 B.R. at 499; *accord In re* Berger, 376 B.R. 42, 46–47 (Bankr. M.D. Ga. 2007) (recognizing that "projected" as modifier renders definition of "disposable income" superfluous). See *supra* note 43 for a discussion regarding the use of income exclusions to give meaning to "current monthly income" and for the list of income exclusions.

131. *In re Nance*, 371 B.R. at 365 n.8 (citing Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995)).

132. See *supra* Part II.B.2.a for a discussion of the majority's viewpoint on the phrase "to be received."

133. *In re* Kolb, 366 B.R. 802, 816 n.19 (Bankr. S.D. Ohio 2007); *see also In re* McGillis, 370 B.R. 720, 726 (Bankr. W.D. Mich. 2007) (stating that phrase "to be received" does not require use of anticipated income or subjective system in place of objective one).

134. *In re Kolb*, 366 B.R. at 816 n.19; *accord In re Berger*, 376 B.R. at 46–47 (agreeing with *Kolb*).

135. *See, e.g.*, *In re* Green, 378 B.R. 30, 37 (Bankr. N.D.N.Y. 2007) (looking to § 1322); *In re Berger*, 376 B.R. at 47 (turning to § 1129); *In re Hanks*, 362 B.R. at 500 (using §§ 109 and 521).

months preceding the bankruptcy filing.[136] Subsections 521(b)(1) and (2) require that debtors file a certificate of this counseling, as well as any debt repayment plan developed in the session.[137] To at least one court, these sections indicate that a historical calculation of income expresses congressional intent that debtors should attempt to resolve financial difficulties outside of bankruptcy.[138]

Another court notes that § 1322 refers to both "disposable income" and "projected disposable income."[139] Unlike the reference to "projected disposable income" in § 1325(b)(1)(B), no definition of "disposable income" follows "projected disposable income" in the same subsection of § 1322(a)(4).[140] This court finds that "[w]ithout the millstone of current monthly income weighing down the term disposable income, projected disposable income takes on its everyday meaning of actual current net income projected into the future."[141] Notably, in § 1322(f), the statute references "disposable income" under § 1325 specifically,[142] which this court finds suggests that when Congress intends to use historical income, it does so by specifically referencing the definition of "disposable income."[143]

Some courts also look to § 1129(a)(15)(B) which provides that if a creditor objects to the confirmation of the plan in the case of an individual Chapter 11 debtor, then the debtor must distribute "not less than the projected disposable income . . . (as defined in section 1325(b)(2))."[144] Some courts reason that this section unequivocally provides the definition of "projected disposable income" because § 1325(b)(2) defines "disposable income" and does not contain the term "projected disposable income."[145] In legal commentary, the Honorable

136. 11 U.S.C. § 109(h) (2006 & Supp. I 2007). Section 109 provides eligibility requirements for debtors to file bankruptcy and, unless otherwise stated in § 109, applies to Chapter 13 debtors. *Id.* § 109. Section 109(h) applies to all debtors under Title 11. *Id.* § 109(h).

137. *Id.* § 521(b)(1)–(2).

138. *In re Hanks*, 362 B.R. at 500. For a discussion of the new provisions required by §§ 109(h) and 521(b)(1) that outline alternative out-of-court bankruptcy proceeding options for debtors, see generally Eugene R. Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA*, 2007 U. ILL. L. REV. 31.

139. *In re Green*, 378 B.R. at 37; *see also* 11 U.S.C. § 1322(a)(4), (f) (referencing "projected disposable income" in § 1322(a)(4) and "'disposable income' under section 1325" in § 1322(f)).

140. 11 U.S.C. § 1322(a)(4); *In re Green*, 378 B.R. at 37.

141. *In re Green*, 378 B.R. at 37.

142. 11 U.S.C. § 1322(f).

143. *In re Green*, 378 B.R. at 37.

144. 11 U.S.C. § 1129(a)(15)(B); *e.g.*, *In re* Berger, 376 B.R. 42, 47 (Bankr. M.D. Ga. 2007) (looking to § 1129(a)(15)(B) for support for meaning of "projected disposable income"). Chapter 11 is the portion of Title 11 that allows businesses or individual debtors to reorganize debts through a repayment plan. 11 U.S.C. §§ 1101–1174. BAPCPA amendments to Chapter 11 made Chapter 11 plans very similar to Chapter 13 plans for individual debtors. Randolph J. Haines, *Chapter 11 May Resolve Some Chapter 13 Issues*, NORTON BANKR. L. ADVISER, Aug. 2007, at 1, 1.

145. *In re Berger*, 376 B.R. at 47; Haines, *supra* note 144, at 2; *accord In re* Kolb, 366 B.R. 802, 816 n.18 (Bankr. S.D. Ohio 2007) (noting that § 1129 suggests that Congress regarded "disposable income" and "projected disposable income" as same concept, but declining to suggest what weight interpretations should give this); *In re* Slusher, 359 B.R. 290, 297 n.10 (Bankr. D. Nev. 2007) (recognizing only that § 1129 refers to definition of "disposable income"); Bruce A. Markell, *The Sub*

Randolph J. Haines cited four reasons why courts can rely upon § 1129's connection between "projected disposable income" and the definition of "disposable income."[146] First, statutory construction allows a single definition to define "'a common term occurring in several places'" of the statute.[147] Second, equating the two terms in § 1129 eliminates any confusion as to whether Congress intended them to have different definitions.[148] Third, because the statutory text in § 1129 indicates that § 1325(b)(2), not § 1325(b)(1)(B), defines "projected disposable income," it "belies an analysis that the disposable income of § 1325(b)(2) is merely a presumption or starting point for determining projected disposable income."[149] Finally, it would be nonsensical for BAPCPA to define "projected disposable income" differently for Chapter 11 and Chapter 13 debtors.[150] Thus, Judge Haines concludes that § 1129(a)(15) provides a potential resolution to the dispute.[151]

3. The Minority Courts Refute the Majority's Reliance Upon Pre- and Postconfirmation Modification Provisions and Support the Use of Historical Income Only at Confirmation

Some of the minority courts hold that relying upon a historical calculation of income at the time of confirmation does not eliminate a later change in the plan payments, finding that BAPCPA requires historical income only at the time of confirmation.[152] These courts recognize that § 1329 does not require postconfirmation plan modifications to comply with any section that includes "current monthly income."[153] One court also recognized that postconfirmation

Rosa Subchapter: Individual Debtors in Chapter 11 After BAPCPA, 2007 U. ILL. L. REV. 67, 87 (noting that "projected disposable income" test for Chapter 11 is "borrowed almost verbatim from chapter 13"); *cf.* Waldron & Berman, *supra* note 25, at 223 n.135 (stating that § 1129 incorrectly references § 1325(b)(2) and noting it may be "scrivener error" or an indicator that "Congress does not necessarily appreciate the difference between disposable income and projected disposable income").

146. Haines, *supra* note 144, at 2; *see also* Coop v. Frederickson (*In re* Frederickson), 375 B.R. 829, 834–35 (B.A.P. 8th Cir. 2007) (noting that Judge Haines' analysis is consistent with approach that "disposable income" and "projected disposable income" are synonymous), *rev'd*, 545 F.3d 652 (8th Cir. 2008).

147. Haines, *supra* note 144, at 2–3 (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 556–57 (1994)) (noting that "deviat[ion] from this principle" occurs only if "its application would violate pre-Code practice," which does not arise in this case).

148. *Id.* at 3.

149. *Id.*

150. *Id.* A Chapter 13 debtor, upon an objection to confirmation, would simply convert to Chapter 11 to escape the objection, creating incentives for debtors to convert to Chapter 11. *Id.* (noting that Chapter 13 Trustees, who do not receive administrative fees in Chapter 11 cases, would be unlikely to object to confirmation if result of objection is elimination of their fees).

151. Haines, *supra* note 144, at 2–3. Notably, however, § 102(8) provides that "a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section." 11 U.S.C. § 102(8) (2006 & Supp. I 2007).

152. *In re* Girodes, 350 B.R. 31, 38 (Bankr. M.D.N.C. 2006).

153. *E.g.*, *In re Girodes*, 350 B.R. at 32, 38 (finding that use of historical income does not foreclose later postconfirmation modification). Postconfirmation modifications must comply with §§

modifications are linked to the requirement of § 521(f)(4) for debtors to file tax returns.[154] This court noted that the use of historical income, if applicable to modifications, renders § 521(f)(4) superfluous.[155] This court found further support in the definition of "property of the estate" found in § 1306, which includes earnings and property received by the debtor postpetition but prior to the discharge of the case, rather than only pre-petition earnings and property.[156] Thus, these courts note that the ability to modify the plan after confirmation may eliminate some impractical results from the use of historical income in the calculation of projected disposable income.[157]

4. The Minority Courts Rely upon Congressional Intent

Congress's actions, or in some cases inaction, indicate that it intended to make changes that may run afoul of pre-BAPCPA practices. As at least one court noted, when Chapter 13 trustees warned Congress that these changes may allow high-income debtors to pay less than what the pre-BAPCPA code required,[158] Congress did not make any changes.[159] Even if Congress did not intend impractical results, another court notes that it is Congress's role, not the

1322(a), 1322(b), 1323(c), and 1325(a). 11 U.S.C. § 1329(b)(1); *In re Girodes*, 350 B.R. at 38. Sections 1322(d) and 1325(b), which reference "current monthly income," are excluded from postconfirmation plan modifications. *In re Girodes*, 350 B.R. at 38. Further, if "current monthly income" applied to postconfirmation modifications, only a change in expenses would be a basis to modify the plan. *Id.* Other courts have followed *Girodes*'s reasoning. *See, e.g.*, *In re* McGillis, 370 B.R. 720, 747 & n.31 (Bankr. W.D. Mich. 2007) (recognizing that § 1325(b) does not govern postconfirmation modifications); *In re* Ireland, 366 B.R. 27, 31 (Bankr. W.D. Ark. 2007) (noting that § 1329 "does not expressly designate compliance with § 1325(b)"); *accord* Pak v. eCast Settlement Corp. (*In re* Pak), 378 B.R. 257, 272 (B.A.P. 9th Cir. 2007) (Klein, J., concurring) (noting § 1325(b) does not apply to postconfirmation modifications), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868 (9th Cir. 2008); 8 COLLIER ON BANKRUPTCY § 1329 (Alan N. Resnick ed., 15th ed. 2009) (noting that Congress made minor amendments to § 1329 in BAPCPA and could have included reference to § 1325(b) if intended for historical income to govern postconfirmation modifications); Hildebrand, *supra* note 45, at 55 (stating that "disposable income" does not appear applicable to § 1329). Further, *In re Hanks* noted that "[w]hat may or may not be permitted following confirmation of a plan is not instructive on what must be done at the actual confirmation hearing," but declined to take any position on the extent of permissible postconfirmation modifications. 362 B.R. 494, 502 n.30 (Bankr. D. Utah 2007), *abrogated by In re* Lanning, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008); *accord In re* Green, 378 B.R. 30, 39 n.11 (Bankr. N.D.N.Y. 2007) (declining to determine whether postconfirmation modifications require use of historical income); *In re* Rotunda, 349 B.R. 324, 331–32 & n.6 (Bankr. N.D.N.Y. 2006) (acknowledging existence of issue regarding disposable income calculations for postconfirmation modification, but declining to decide issue). *Contra In re* Kolb, 366 B.R. 802, 817 n.21 (Bankr. S.D. Ohio 2007) (noting that use of historical income impacts postconfirmation plan modifications).

154. *In re Girodes*, 350 B.R. at 38.

155. *Id.*

156. *Id.*

157. *E.g.*, *In re* Nance, 371 B.R. 358, 367 (Bankr. S.D. Ill. 2007) (noting that § 1329 provides potential solution to "impractical results" from use of historical income at confirmation).

158. See *supra* notes 30–32 and accompanying text for a discussion of pre-BAPCPA practices.

159. *In re* Alexander, 344 B.R. 742, 747–48 (Bankr. E.D.N.C. 2006) (quoting Culhane & White, *supra* note 126, at 682).

judiciary's, to correct the statute.[160] Further, other courts recognize the possibility that Congress believed that an average of income would be more accurate and, thus, chose "formulaic certainty over judicial discretion."[161] One court notes that, perhaps, Congress felt that while abuse may be more visible under the formulaic approach, the overall abuse will be less.[162]

While some courts rely upon legislative history, at least one has found, and commentators agree, that legislative history does not exist.[163] First, there are no Senate or conference reports on BAPCPA.[164] Second, the House Report is not instructive regarding Congress's intent and only tracks the language of BAPCPA.[165] Thus, at least one court concludes that an interpretation cannot use the legislative history to determine congressional intent.[166] Further, this court also finds that it is not clear that BAPCPA's goal was to "'ensure that debtors repay creditors the maximum they can afford'" due to the income exclusions set forth in the definition of "current monthly income."[167] Another court recognizes the possibility that Congress intended to keep some people out of bankruptcy altogether by looking at the additions of the pre-petition requirements of credit counseling in §§ 109(h)(1) and 521(b)(2) to support this view.[168]

III. BAPCPA REQUIRES THE USE OF HISTORICAL INCOME DESPITE THE MAJORITY COURTS' ATTEMPT TO MANIPULATE BAPCPA TO REQUIRE ANTICIPATED INCOME

In the split interpretation regarding the meaning of "projected disposable income" in § 1325(b)(1)(B) of Title 11, the majority of courts argue for the use of

160. *In re Alexander*, 344 B.R. at 748.

161. *In re* Kolb, 366 B.R. 802, 817 (Bankr. S.D. Ohio 2007); *see also In re* Rotunda, 349 B.R. 324, 329 (Bankr. N.D.N.Y. 2006) (quoting Culhane & White, *supra* note 126, at 682) (noting congressional intent to replace judicial discretion with "rules-based calculations").

162. *In re* Winokur, 364 B.R. 204, 206 (Bankr. E.D. Va. 2007).

163. *See In re* Nance, 371 B.R. 358, 366 (Bankr. S.D. Ill. 2007) (stating legislative history on how to calculate "'debtor's current monthly income' is virtually non-existent"); Braucher, *supra* note 22, at 100 (remarking that thin legislative history makes it hard to determine intent); Waldron & Berman, *supra* note 25, at 216 (stating that it is not clear whether legislative history for BAPCPA exists that would be helpful as resource to interpret statute).

164. *In re Nance*, 371 B.R. at 366; Waldron & Berman, *supra* note 25, at 217 (noting existence of "no joint conference committee report, . . . Senate Judiciary Committee Report, . . . no floor statements, . . . or even consistent Senate and House committee reports").

165. *In re Nance*, 371 B.R. at 366; Waldron & Berman, *supra* note 25, at 217 (noting that "House Judiciary Committee Report is often a mere repetition of the text of BAPCPA").

166. *In re Nance*, 371 B.R. at 366 (noting that, without more, courts should not use existing legislative history).

167. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302 (B.A.P. 1st Cir. 2007) (quoting H.R. REP. NO. 109-31, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89) (providing basis that many courts rely upon to determine BAPCPA requires use of anticipated income). See *supra* note 43 for the income exclusions set forth in § 101(10A)(B).

168. *In re* Hanks, 362 B.R. 494, 500 (Bankr. D. Utah 2007), *abrogated by In re* Lanning, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008). See *supra* notes 136–37 and accompanying text for a discussion of pre-petition requirements provided by §§ 109 and 521.

anticipated income,[169] but the minority of courts following the statutory definition of "disposable income" in § 1325(b)(2) to use historical income to calculate projected disposable income are correct.[170] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[171] clearly mandates the use of historical income in the calculation of projected disposable income in § 1325(b)(1)(B). The meaning of § 1325(b)(1)(B) is not ambiguous because the term "projected" and phrases "to be received" and "as of the effective date of the plan" coincide with BAPCPA's requirement for the use of historical income.[172] Courts arguing for the use of anticipated income fail to consider the plain meaning of the term "projected" and manipulate the statutory text to achieve the desired result of using anticipated income.[173] Further, both the legislative history of BAPCPA and provisions outside of § 1325 indicate a congressional intent to use historical income.[174] Finally, the use of historical income does not cause an absurd result.[175]

A. The Plain Meaning of 11 U.S.C. § 1325(b)(1)(B) Is Not Ambiguous

1. The Term "Projected" Coincides with the Use of Historical Income

The term "projected" in § 1325(b)(1)(B) coincides with Congress's definition of "disposable income" in § 1325(b)(2).[176] First, applying too much importance to the term "projected," as the majority does,[177] renders the definition of "disposable income" meaningless.[178] The majority's interpretation does not coincide with the canon of statutory interpretation to give all words meaning without rendering any superfluous that many majority opinions, such as *Kibbe v. Sumski* (*In re Kibbe*),[179] rely upon extensively.[180] Instead, applying

169. See *supra* Part II.B for a discussion of the majority's argument for the use of anticipated income.

170. See *supra* Part II.C for a discussion of the minority's position for the use of historical income.

171. Pub. L. No. 109-8, 119 Stat. 23 (codified in 11 U.S.C. and scattered sections of 12, 18, and 28 U.S.C.).

172. See *infra* Part III.A for a discussion of the statutory interpretation of § 1325(b).

173. See *infra* Parts III.A.2–5 for a discussion of the majority's manipulation of statutory text.

174. See *infra* Part III.B for a discussion regarding the provisions and legislative history of BAPCPA that require the use of historical income.

175. See *infra* Part III.C for a discussion regarding whether the use of historical income causes an absurd result.

176. "'[D]isposable income' means current monthly income [i.e., historical income] received by the debtors . . . less amounts reasonably necessary to be expended . . . ." 11 U.S.C. § 1325(b)(2) (2006 & Supp. I 2007).

177. See *supra* Part II.B.1 for a discussion of the majority's position on the meaning of the term "projected" in § 1325(b)(1)(B).

178. *See In re* Kolb, 366 B.R. 802, 816 (Bankr. S.D. Ohio 2007) (finding that if "projected" modifies "disposable income" in way some courts find, that interpretation renders definition of "disposable income" meaningless).

179. 361 B.R. 302, 312–13 (B.A.P. 1st Cir. 2007).

meaning to both the term "projected" and the definition of "disposable income" requires interpretation of the grammatical structure of the statutory text.[181] Notably, the term "disposable income" is offset in quotation marks in § 1325(b)(2), while "projected disposable income" is not offset in quotation marks in § 1325(b)(1)(B).[182] This grammatical difference indicates that "projected disposable income" is not a free-standing term distinguishable from "disposable income."[183] Further, the definition of "disposable income" follows "projected disposable income" in § 1325(b), indicating that the definition defines "projected disposable income."[184] An interpretation of § 1325(b) that does not use the definition of "disposable income" to define "projected disposable income," renders "disposable income" a free-standing, meaningless definition.[185]

When one analyzes the plain meaning of the definition of "project"—"to calculate, estimate, or predict (something in the future), based on present data or trends"[186]—it is clear that present data or trends calculate a future figure. In this instance, the present data or trend[187] is disposable income, calculated using historical income,[188] which the court predicts into the future for the duration of the plan. Thus, the plain meaning of the term "projected" is not contradictory with historical income because the definition of "projected" relies upon calculating a future figure based on data currently known, not future data. In other words, Congress chose a set method for the determination of the data, i.e., the definition of "disposable income" in § 1325(b)(2), which indicates that Congress intended to base "projected disposable income" upon a historical income trend.[189]

180. An interpretation must give all statutory words meaning and not render any superfluous. *Kibbe*, 361 B.R. at 312–13.

181. See *supra* notes 33–41 and accompanying text for a discussion of statutory interpretation.

182. 11 U.S.C. § 1325(b)(1)(B), (b)(2) (2006 & Supp. I 2007).

183. *See In re* Austin, 372 B.R. 668, 677 (Bankr. D. Vt. 2007) (finding that absence of quotation marks in § 1325(b)(1)(B) indicates "projected disposable income" is not separate term). Notably, "current monthly income" is offset in quotations in § 101(10A) where BAPCPA defines it, but it is not offset in quotations when BAPCPA uses the term, such as in § 1325(b)(2) for Chapter 13 debtors or § 707(b)(2)(A)(i) for Chapter 7 debtors. 11 U.S.C. §§ 101(10A), 707(b)(2)(A)(i), 1325(b)(2). This further indicates that quotations offsetting "disposable income" in § 1325(b)(1)(B) are not necessary to indicate that it is the defined term.

184. 11 U.S.C. § 1325(b).

185. *See In re* Alexander, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006) (finding that plain reading of statute indicates that if definition of "disposable income" is not linked to "projected disposable income" then "it is just a floating definition with no apparent purpose").

186. THE AMERICAN HERITAGE COLLEGE DICTIONARY 1114 (4th ed. 2002).

187. A trend is "a general tendency, movement, or direction." MSN.com, Encarta Dictionary: Trend, http://encarta.msn.com/dictionary_/trend.html (last visited July 2, 2009). Certainly, historical income, which is a six-month average of income, qualifies as a general tendency, movement, or direction of income. *See* 11 U.S.C. § 101(10A) (defining "current monthly income" as an average of income received during six-month period).

188. *See* 11 U.S.C. § 1325(b)(2) (analyzing "disposable income" using "current monthly income" as defined in § 101(10A)).

189. *See In re* Kolb, 366 B.R. 802, 817 (Bankr. S.D. Ohio 2007) (noting that Congress intended "formulaic certainty" over judicial discretion in calculation of income). "The [historical income

2. Courts That Rely on the Term "Projected" Fail to Consider the Plain Meaning of the Statutory Text

Most, if not all, of the majority courts that rely upon the term "projected" to indicate the use of anticipated income fail to consider the plain meaning of the text of § 1325(b)(1)(B) and § 1325(b)(2). *In re Hardacre*,[190] "the first opinion to address [this] issue,"[191] failed to consider the plain meaning of the term "projected."[192] Instead, *Hardacre* focused on the addition of the term "projected" and concluded, with little reasoning, that the addition of "projected" must alter the definition of "disposable income."[193] *In re Jass*[194] began with a plain meaning analysis of the term "projected" in § 1325(b)(1)(B) and defined it as "to calculate, estimate, or predict (something in the future), based on present data or trends."[195] *Jass*, however, failed to consider that the definition of "projected" requires the use of present data or trends, not anticipated data or trends, in the calculation.[196] *Jass* simply omitted that portion of the definition of "projected" in its reasoning and found that "projected" requires the use of anticipated income.[197]

Many courts follow the *Hardacre* and *Jass* methods of reasoning with little addition of their own analysis.[198] For example, *In re Kibbe*[199] relied upon *Hardacre*'s reasoning and interpretation in its conclusion that BAPCPA requires the use of anticipated income, but also added that if Congress intended "projected disposable income" to be synonymous with "disposable income" it would have deleted "projected" from § 1325(b)(1)(B).[200] *Kibbe* failed to consider any other use or meaning of the term "projected." Notably, the First Circuit's Bankruptcy Appellate Panel affirmed *Kibbe* by focusing on the tenet of statutory construction that provides that all statutory words must have meaning, without rendering any superfluous.[201] In *Pak v. eCast Settlement Corp*. (*In re*

calculation] construction of § 1325(b) is the correct reading of the current Code." Drobish, *supra* note 121, at 205.

190. 338 B.R. 718 (Bankr. N.D. Tex. 2006).

191. *In re* Zimmerman, No. 06-31086, 2007 Bankr. LEXIS 410, at *16 (Bankr. N.D. Ohio Jan. 29, 2007).

192. *See In re Hardacre*, 338 B.R. at 723 (failing to discuss plain meaning of "projected" during evaluation of term "projected disposable income").

193. *Id.*

194. 340 B.R. 411 (Bankr. D. Utah 2006).

195. *In re Jass*, 340 B.R. at 415 (quoting THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 186, at 1114).

196. *Jass* reasons that by placing "projected" in front of "disposable income," it modifies the meaning of "disposable income," resulting in the consideration of both historical and anticipated income. *Id.* at 415–16.

197. *Id.*

198. See *infra* note 205 for examples of courts that follow *Hardacre* and *Jass* and fail to provide any unique analysis.

199. 342 B.R. 411 (Bankr. D.N.H. 2006), *aff'd sub nom*. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302 (B.A.P. 1st Cir. 2007).

200. *In re Kibbe*, 342 B.R. at 414.

201. *Kibbe*, 361 B.R. at 312–13.

Pak),[202] the Bankruptcy Appellate Panel for the Ninth Circuit followed the *Jass* definition of "projected," stating that courts used this interpretation prior to the BAPCPA amendments.[203] Without any discussion of the actual meaning of the definition, *Pak* concluded that the term "projected" is "future-oriented."[204] Both of the *Kibbe* opinions and the *Pak* opinion, however, fail to consider the actual meaning of the term "projected," like *Hardacre* and *Jass*, by simply assuming without discussion that the term requires the use of anticipated income.[205] These result-oriented interpretations force debtors, like Karen Kibbe, John Pak, and the Jasses, to ignore BAPCPA in favor of the courts' manipulated interpretation.[206] These debtors were unable to rely upon the provisions of BAPCPA with certainty when proposing their plans.

3. The Phrase "To Be Received" Does Not Require the Use of Anticipated Income

Some of the majority courts rely upon the phrase "to be received" in § 1325(b)(1)(B) to indicate the use of anticipated income.[207] This interpretation of the phrase "to be received" overanalyzes the phrase's simplicity. The phrase "to be received" indicates that the debtor will receive the projected disposable income during the applicable commitment period.[208] Clearly, debtors do not have all projected disposable income at the time of confirmation that debtors

202. 378 B.R. 257 (B.A.P. 9th Cir. 2007), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868 (9th Cir. 2008). The Ninth Circuit Court of Appeals abrogated *Pak* in *Kagenveama*. *Kagenveama*, 541 F.3d. at 874–75. This Comment discusses *Pak* only to illustrate the flawed reasoning that the Ninth Circuit Bankruptcy Appellate Panel employed in *Pak* because it is representative of bankruptcy courts' flawed reasoning across the nation.

203. *Pak*, 378 B.R. at 263–64.

204. *Id.* at 264.

205. *In re Austin* found that the *Kibbe*, *Jass*, and *Hardacre* viewpoint "strain[s] and distort[s] the meaning of 'projected' beyond the common understanding of that word." *In re* Austin, 372 B.R. 668, 678 (Bankr. D. Vt. 2007). Many other majority courts also commit a similar error in their reasoning. *See, e.g.*, *In re* Arsenault, 370 B.R. 845, 850 (Bankr. M.D. Fla. 2007) (finding plain meaning of "projected" and Congress's choice to modify "disposable income" with "projected" support *Hardacre* view that "projected" is forward looking); *In re* Lanning, No. 06-41037, 2007 Bankr. LEXIS 1639, at *19 (Bankr. D. Kan. May 15, 2007) (agreeing with those courts finding that "projected" is forward looking and adding no new analysis regarding term "projected"), *aff'd*, 380 B.R. 17 (B.A.P. 10th Cir. 2007), *aff'd*, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008); *In re* LaPlana, 363 B.R. 259, 265–66 (Bankr. M.D. Fla. 2007) (stating "[q]uite simply, 'projected' is a forward-looking term" but failing to define it); *In re* Devilliers, 358 B.R. 849, 858 (Bankr. E.D. La. 2007) (using similar reasoning as that used in *Arsenault* to conclude that "projected" is forward looking).

206. See *supra* notes 9–17 and accompanying text for a discussion of the facts of the debtors' cases.

207. See *supra* Part II.B.2.a for a discussion of courts that rely upon "to be received" for the use of anticipated income.

208. *In re* Kolb, 366 B.R. 802, 816 n.19 (Bankr. S.D. Ohio 2007) (finding that phrase "simply refers to the payments that will be received throughout the life of the plan"); *accord In re* Berger, 376 B.R. 42, 47–48 (Bankr. M.D. Ga. 2007) (agreeing with *Kolb* court); *In re* McGillis, 370 B.R. 720, 726 (Bankr. W.D. Mich. 2007) (stating that phrase "to be received" does not require use of anticipated income or subjective system in place of objective one).

will pay over the applicable commitment period. The phrase "to be received" does not imply that projected disposable income is forward-looking, except in the sense that debtors will receive the projected disposable income in the future.

4. The Phrase "As of the Effective Date of the Plan" Does Not Require the Use of Anticipated Income

The majority courts also rely upon the phrase "as of the effective date of the plan" in § 1325(b)(1) to indicate the use of anticipated income.[209] As with the phrase "to be received," this interpretation overanalyzes the simple phrase. Section 1325(b)(1)(B) provides that "the court may not approve the plan unless, *as of the effective date of the plan*," the plan provides all "projected disposable income."[210] This means that, unless the plan provides all projected disposable income, however one may calculate it, as of the effective date of the plan, the court cannot confirm the plan.[211] Even if the majority courts' interpretation of this phrase is correct, that interpretation still indicates a six-month average income figure that remains static as of the effective date of the plan, not an anticipated income figure that changes throughout the plan.[212]

5. Courts' Manipulation of Statutory Text to Achieve a Desired Result Contributes to the Split Interpretation of "Projected Disposable Income"

Courts' manipulation of the statutory text in order to achieve the desired result of using anticipated income directly contributes to the split interpretation of the reconciliation of "projected disposable income" in § 1325(b)(1)(B) with the definition of "disposable income" in § 1325(b)(2) and essentially ignores BAPCPA.[213] *Hardacre* found that BAPCPA requires the use of anticipated income by stating that "anomalous results . . . could occur by strictly adhering to *section 101(10A)*'s" historical income calculation and then conducted a textual analysis of § 1325(b)(1)(B) and (b)(2) consistent with the desired result of using anticipated income.[214] *Jass* relied upon the incorporation of § 707(b)(2)(B)'s "special circumstances" provision in § 1325(b)(3) to determine the possible use of anticipated income, but failed to note that § 1325(b)(3) discusses expenses only, not income.[215] *Jass*'s biased interpretation is somewhat more discreet than

209. See *supra* Part II.B.2.b for a discussion of courts that rely upon the phrase "as of the effective date of the plan" for the use of anticipated income.

210. 11 U.S.C. § 1325(b)(1)(B) (2006 & Supp. I 2007) (emphasis added).

211. *Id.*

212. *See id.* § 101(10A) (requiring average income from six-month period).

213. *See* Drobish, *supra* note 121, at 208 (noting that majority's interpretation abandons BAPCPA's new method of calculation in favor of "same nuanced methods practiced prior to [BAPCPA]"). See *supra* notes 26 and 28 for the statutory text of § 1325(b)(1)(B) and (b)(2) and Parts II.B–C for a discussion of the two diverging meanings.

214. *In re* Hardacre, 338 B.R. 718, 722–23 (Bankr. N.D. Tex. 2006) (emphasis added). Notably, even though the Chapter 13 trustee raised an objection under § 1325(b)(1)(B), the objection did not actually challenge the income calculation, resting instead on the ground that the debtors impermissibly deducted an expense twice, indicating the court's intention to apply its desired result. *Id.* at 720.

215. *In re* Jass, 340 B.R. 411, 418–19 (Bankr. D. Utah 2006). See *supra* note 81 for the statutory

Hardacre's, but both reveal an overriding desired result to use anticipated income, which influences and directs the courts' interpretations of the statute.[216] This overriding desire for a certain result causes debtors, like Karen Kibbe, John Pak, and the Jasses, to ignore the statutory text of BAPCPA if they wish for the court to confirm their plans.[217]

In contrast, the Ninth Circuit Court of Appeals in *Maney v. Kagenveama* (*In re Kagenveama*)[218] recognized that § 1325(b)(2) "represents a deliberate departure" from the pre-BAPCPA calculation of disposable income that relied heavily on the facts and circumstances of each case.[219] Further, the Bankruptcy Appellate Panel for the Eighth Circuit, in *Coop v. Frederickson* (*In re Frederickson*),[220] noted that BAPCPA requires the use of historical income because "Congress has given [§ 1325(b)] new parameters, with the intention of producing results dramatically different from pre-BAPCPA outcomes."[221] Other courts finding for the use of historical income are in accord with these viewpoints. For example, *In re Alexander*[222] recognized that, regardless of criticisms about BAPCPA, the "existing statutory text" is the starting point for an interpretation, not the prior statutory text.[223] Another opinion, *In re Barr*,[224]

text of § 707(b)(2)(B). See *supra* notes 194–97 and accompanying text for *Jass*'s manipulation of the definition of the term "projected." See *infra* Part III.B.2.b for a discussion regarding the inapplicability of § 707(b)(2)(B) to income for Chapter 13 debtors.

216. *Jass* is more discreet because it attempts to apply the "special circumstances" provision to support its desired result. *See In re Jass*, 340 B.R. at 418 (concluding incorporation of "special circumstances" provision supports consideration of anticipated income). *Hardacre* interprets the statutory language after concluding that BAPCPA requires the use of anticipated income. *In re Hardacre*, 338 B.R. at 722–23. See *supra* notes 202–04 and accompanying text for a discussion of *Pak*'s manipulation of statutory text to apply pre-BAPCPA practices rather than the new BAPCPA practices.

217. See *supra* notes 9–17 and accompanying text for a discussion of the facts of the debtors' cases.

218. 541 F.3d 868 (9th Cir. 2008).

219. *Kagenveama*, 541 F.3d at 874. Notably, *Kagenveama* involved a debtor who had negative "disposable income," which indicates that *Kagenveama* committed to its interpretation even if that interpretation produced less than desirable results. *Id.* at 871.

220. 375 B.R. 829 (B.A.P. 8th Cir. 2007), *rev'd*, 545 F.3d 652 (8th Cir. 2008). Since the time that I originally authored this Comment, the Eighth Circuit Court of Appeals reversed the Bankruptcy Appellate Panel's opinion in *Frederickson*. While *Frederickson* is no longer good law, I believe that the arguments in *Frederickson* are still valuable for the discussion of what constitutes projected disposable income and for that purpose have decided to retain the analysis of *Frederickson* in this Comment.

221. *Frederickson*, 375 B.R. at 835. The court also noted that post-BAPCPA practice will vary from pre-BAPCPA practice even though § 1325(b) contained the term "projected disposable income" before the BAPCPA amendment. *Id.* Like *Kagenveama*, *Frederickson* also involved a debtor who had "negative disposable income." *Id.* at 831.

222. 344 B.R. 742 (Bankr. E.D.N.C. 2006).

223. *In re Alexander*, 344 B.R. at 747 (quoting Lamie v. U.S. Tr., 540 U.S. 526, 533 (2004)). *Alexander* disagreed with another opinion that found that a debtor without "disposable income" by definition had "projected disposable income." *Id.* at 749–50 (disagreeing with *In re Kibbe*, 342 B.R. 411 (Bankr. D.N.H. 2006), *aff'd sub nom*. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302 (B.A.P. 1st Cir. 2007)). Notably, *Alexander* also involved debtors who had negative "disposable income," which, like *Kagenveama* and *Frederickson*, indicates commitment to its interpretation. *Id.* at 747 n.4.

also found that Congress's adoption of a "bright line test" indicates that some debtors may have income that BAPCPA does not require debtors to include in the calculation of projected disposable income.[225] *Kagenveama*, *Frederickson*, *Alexander*, and *Barr* interpreted the statutory text as written and committed to BAPCPA's implementation of the use of historical income, rather than manipulating the statutory text to fit the desired result of using anticipated income.

B. Congressional Intent Indicates the Use of Historical Income

1. Legislative History Indicates That BAPCPA Requires the Use of Historical Income

While many majority courts rely heavily upon the House Report stating that Congress intended to "ensure that debtors repay creditors the maximum they can afford,"[226] the majority uses this quote out of its context.[227] The entire sentence containing the quoted phrase states: "The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), intended to ensure that debtors repay creditors the maximum they can afford."[228] This quotation from the House Report specifically references the implementation of a new calculation method, not, as the majority courts find, a redefined use of the previous method.[229]

Further, the sentence preceding the much-quoted phrase begins "[w]ith respect to the interests of creditors" and then lists proposed reforms that benefit

224. 341 B.R. 181 (Bankr. M.D.N.C. 2006).

225. *In re Barr*, 341 B.R. at 184–85 (quoting COLLIER ON BANKRUPTCY, *supra* note 153, § 1325.08[1]); *see also In re* Austin, 372 B.R. 668, 680 (Bankr. D. Vt. 2007) (recognizing adoption of "litmus test"). Like *Kagenveama*, *Frederickson*, and *Alexander*, *Barr* also involved debtors with negative "disposable income." *In re Barr*, 341 B.R. at 183.

226. H.R. REP. NO. 109-31, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89; *see also Kibbe*, 361 B.R. at 314 (finding that "intent of Congress can be best gleaned by" House Report's phrase); *In re* Arsenault, 370 B.R. 845, 850 (Bankr. M.D. Fla. 2007) (quoting House Report's phrase to find intent of BAPCPA); *In re* Zimmerman, No. 06-31086, 2007 Bankr. LEXIS 410, at *20 (Bankr. N.D. Ohio Jan. 29, 2007) (concluding use of anticipated income conforms with "clear intent" to ensure debtors pay maximum affordable).

227. One court noted that, while it was "well aware" that the House Report seemingly indicated intent for debtors to pay the maximum they can afford, "such statements are insufficient to overcome both the plain language of the statute and the statements' apparent conflict with other policies at play in the BAPCPA." *In re* Hanks, 362 B.R. 494, 500–01 n.23 (Bankr. D. Utah 2007), *abrogated by In re* Lanning, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008).

228. H.R. REP. NO. 109-31, at 2.

229. Prior to BAPCPA, courts used anticipated income to calculate "projected disposable income." See *supra* notes 30–32 and accompanying text for a discussion regarding pre-BAPCPA practices. Thus, the argument for the use of anticipated income under BAPCPA fails to implement a new calculation method. See *supra* Part II.B for a discussion of the majority's argument for the use of anticipated income.

creditors.[230] This indicates that the much-quoted phrase, which does not specifically reference the interests of either debtors or creditors, must refer to reforms that benefit both debtors and creditors in consumer bankruptcy.[231] Courts that rely on the phrase do so to support creditors obtaining more money, such as in the case of Karen Kibbe.[232] That position, however, is not clearly supported by the House Report. Perhaps Congress did not intend for "the maximum they can afford" to mean the inclusion of all income. After all, Congress did specifically exclude several types of income from the calculation of "current monthly income."[233] Further, "afford" does not necessarily mean "all" income. Perhaps Congress intended for debtors to pay an affordable figure that would lead to more success in bankruptcy, as this would "ensure that the system is fair for both debtors and creditors."[234] As one court suggested, perhaps Congress chose "formulaic certainty over judicial discretion."[235]

2. Provisions Outside of § 1325 Indicate Congressional Intent to Use Historical Income

a. Section 1129's Cross-Reference to § 1325(b)(2)'s Definition of "Disposable Income" Mandates Use of Historical Income

Congress specifically rendered "projected disposable income" and "disposable income" synonymous when it cross-referenced § 1325(b)(2)'s definition of "disposable income" with "projected disposable income" in § 1129(a)(15)(B).[236] While the majority courts supporting the use of anticipated income do not refute this position, there is, however, one reason why it may not be appropriate to render the two terms synonymous on this basis.[237] The rules of construction, found in § 102 of Title 11, provide that "a definition, contained in a

230. H.R. REP. NO. 109-31, at 2.

231. *See id.* (failing to refer to whose interests are benefited by intent to ensure debtors pay maximum they can afford).

232. *See, e.g.*, Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 314 (B.A.P. 1st Cir. 2007) (noting that use of historical income would not comply with House Report's phrase because it would cheat or foreclose creditors from obtaining BAPCPA benefits). See *supra* notes 9–12 and accompanying text for a discussion of the facts of Ms. Kibbe's case.

233. 11 U.S.C. § (10A)(B) (2006 & Supp. I 2007); H.R. Rep. No. 109-31, at 2; *see also In re* Nance, 371 B.R. 358, 366 (Bankr. S.D. Ill. 2007) (expressing that BAPCPA clearly intends to ensure maximum repayment due to income exclusions). See *supra* note 43 for the income excluded by § 101(10A)(B).

234. H.R. REP. NO. 109-31, at 2.

235. *In re* Kolb, 366 B.R. 802, 817 (Bankr. S.D. Ohio 2007).

236. See *supra* note 145 for courts that support use of 11 U.S.C. § 1129(a)(15)(B) for such an interpretation of "projected disposable income." See *supra* notes 146–51 and accompanying text for a discussion regarding the Honorable Randolph J. Haines's support for reliance upon § 1129(a)(15)(B)'s reference to the definition of "disposable income" in § 1325(b)(2). See *supra* note 144 and accompanying text for the pertinent statutory language of § 1129(a)(15).

237. One judge noted that the cross-reference in § 1129 to § 1325(b)(2) may be incorrect and could be "dismissed as a simple 'scrivener error.'" Waldron & Berman, *supra* note 25, at 223 n.135. This Comment assumes that a scrivener did not type § 1325(b)(2) instead of § 1325(b)(1)(B).

section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section."[238] One may argue that § 1129's cross-reference to § 1325(b)(2)'s definition of "disposable income" to define "projected disposable income" in § 1129 does not define "projected disposable income" in § 1325(b)(1)(B). It seems unlikely, however, that Congress would specifically reference § 1325(b)(2)'s definition of "disposable income" for Chapter 11 debtors, but not intend that definition for Chapter 13 debtors.[239] If "projected disposable income" requires the use of anticipated income, as some courts argue, and if the definition of "disposable income" only refers to Chapter 11 debtors, as § 102(8) may indicate when combined with anticipated income arguments, then Congress would have included the definition of "disposable income" in § 1129 and deleted it from § 1325 altogether. Given Congress's reference in § 1129 to "projected disposable income" and the inclusion of the definition of "disposable income" in § 1325(b)(2), it seems much more likely that Congress intended "projected disposable income" and "disposable income" to be synonymous. Perhaps § 1325(b)(2) does not as clearly indicate that "projected disposable income" and "disposable income" are synonymous, like § 1129(a)(15)(B) does, because the drafters of BAPCPA did not find § 1325(b) to be unclear.[240]

b. The "Special Circumstances" Provision Mandates the Use of Historical Income By Not Applying to Income for Chapter 13 Debtors

While some majority courts apply § 707(b)(2)(B)'s "special circumstances" provision to support the use of anticipated income in the calculation of projected disposable income, this is clearly erroneous.[241] Section 1325(b)(3), which incorporates § 707(b)(2)(B) for Chapter 13 debtors, refers only to the expense component of the "disposable income" definition.[242] Courts that fail to address this problem, such as the *Jass* court,[243] clearly employ erroneous reasoning and manipulate the language of BAPCPA to reach a desired result, i.e., the use of

238. 11 U.S.C. § 102(8).

239. Chapter 13 of Title 11 applies to Chapter 13 debtors. 11 U.S.C. §§ 1301–1330.

240. *See* Waldron & Berman, *supra* note 25, at 202–03 (noting that even though drafters attempt clarity, when applied in practice, plain meaning and intent is not always clear and judges do not always agree when text is ambiguous). See *supra* notes 22–23 and accompanying text for a discussion of the poor drafting of BAPCPA.

241. See *supra* Part II.B.3.b for a discussion of courts relying upon the "special circumstances" provision.

242. 11 U.S.C. § 1325(b)(3); *In re* Riding, 377 B.R. 239, 241 n.3 (Bankr. W.D. Mo. 2007) (noting that "[s]ection 1325(b)(3) provides that expenses (but not income) shall be determined in accordance with § 707(b)(2)"). See *supra* note 85 for a discussion of the statutory text of § 1325(b)(3). Notably, § 1325(b) only incorporates § 707(b)(2)(A) and (B) for above-median-income debtors. 11 U.S.C. § 1325(b)(3). See *supra* note 26 for a discussion of above- and below-median-income debtors. Thus, even if § 707(b)(2)(B) allows debtors to invoke "special circumstances" for a change in income, it does not apply to below–median–income debtors, such as Karen Kibbe. See *supra* notes 9–12 and accompanying text for a discussion of the facts of Ms. Kibbe's case.

243. See *supra* notes 215–16 and accompanying text for a discussion of *Jass*'s employment of "special circumstances."

anticipated income, which is illustrated in the Jasses' case.[244] *In re Briscoe*,[245] in finding for the use of anticipated income, addressed and resolved this problem by assuming that Congress already intended to take into account "special circumstances" by use of the term "projected."[246] This interpretation is inconclusive given the large discrepancy among courts regarding the meaning of "projected disposable income." One can hardly conclude that the placement of the single term "projected" incorporates the entire "special circumstances" provision for Chapter 13 debtors' income.

In a concurring opinion in *Pak*, Judge Klein addressed the argument that the "special circumstances" provision does not apply to income for Chapter 13 debtors.[247] Judge Klein argued that, because § 1325(b)(3) incorporates § 707(b)(2)(B), which deals with both income and expenses, to Chapter 13 debtors, it must apply for both income and expenses.[248] He based his conclusion almost solely on his difficulty in imagining "how only snippets of the special circumstances adjustments would be applicable."[249] Judge Klein, however, fails to recognize that Congress could have incorporated § 707(b)(2)(B) into another portion of § 1325, so that congressional intent to incorporate § 707(b)(2)(B) would be more clear, such as in § 1325(b)(2), where the "disposable income" definition is found."[250] If Congress intended the "special circumstances" provision to apply to both income and expenses for Chapter 13 debtors, why did Congress only incorporate § 707(b)(2)(B) into the expense definition in § 1325(b)(3)? One has a hard time finding a legitimate answer to this question. Further, it is not difficult to imagine how the "special circumstances" provision applies to expenses, while income remains a static figure as defined in § 101(10A).[251] This does not lead to an absurd result, as Judge Klein seems to

244. *See, e.g.*, *In re* Mancl, 375 B.R. 514, 516–17 (Bankr. W.D. Wis. 2007) (finding if historical income does not constitute anticipated income, then court should use anticipated income), *rev'd sub nom*. Mancl v. Chatterton (*In re* Mancl), 381 B.R. 537 (W.D. Wis. 2008); *In re* Moore, 367 B.R. 721, 726 (Bankr. D. Kan. 2007) (finding that courts may adjust historical income upon proper showing of "special circumstances"); *In re* Teixeira, 358 B.R. 484, 486–87 (Bankr. D.N.H. 2006) (finding that debtors may use anticipated income if debtor rebuts presumption of no change in income); *In re* Jass, 340 B.R. 411, 418 (Bankr. D. Utah 2006) (stating that if debtor rebuts presumption to use historical income, debtor may use anticipated income). See *supra* notes 16–17 and accompanying text for a discussion of the facts of the Jasses' case.

245. 374 B.R. 1 (Bankr. D.D.C. 2007).

246. *In re Briscoe*, 374 B.R. at 18.

247. Pak v. eCast Settlement Corp. (*In re* Pak), 378 B.R. 257, 272 (B.A.P. 9th Cir. 2007) (Klein, J., concurring), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 874 (9th Cir. 2008).

248. *Id.* at 272 (Klein, J., concurring). Notably, Judge Klein did recognize that the "special circumstances" provision is not a perfect interpretation, but continued to argue that it is plausible. *Id.* at 271.

249. *Id.* at 272.

250. *See In re* Musselman, 379 B.R. 583, 588 (Bankr. E.D.N.C. 2007) (noting that if Congress intended for "special circumstances" provision to apply to income, "it could have so stated within the confines of § 1325(b)").

251. See *supra* note 28 for the definition of income in § 101(10A).

suggest, because § 707(b)(2)(B) does not require that a debtor adjust both income and expenses to prove "special circumstances."[252]

While at least one court, *In re Clemons*,[253] noted a senator's position that the absence of the "special circumstances" provision for a Chapter 13 debtor's income was an oversight,[254] this is also inconclusive.[255] Congress enacted BAPCPA and presumably intended the statute to mean what it says.[256] If Congress intended the "special circumstances" provision to apply to a Chapter 13 debtor's income, then Congress, not the courts, must amend BAPCPA to provide this result.[257] Further, even if the "special circumstances" provision applies to income for Chapter 13 debtors, *In re Ries*[258] noted that only debtors, not creditors or Chapter 13 trustees, can invoke the privilege of the "special circumstances" provision because debtors bear the burden of proof according to § 707(b)(2)(B)(ii), rendering the interpretation of adjustment to historical income invalid.[259] For example, the Jasses, assuming that § 707(b)(2)(B) applies to income for Chapter 13 debtors, would invoke the "special circumstances" provision to present evidence of their decreased income and, thus, the use of historical income would not adversely affect the Jasses.[260]

c. Modifications of the Plan Are Not Inconsistent with the Use of Historical Income

Some majority courts rely upon the provisions of §§ 1323 and 1329, authorizing pre- and postconfirmation modifications to the plan,[261] to find that

252. *See* 11 U.S.C. § 707(b)(2)(B) (2006 & Supp. I 2007) (providing no requirement that debtors must have adjustments to both income and expenses to prove "special circumstances"). Further, the examples of "special circumstances" in § 707(b)(2)(B) do not implicate solely income changes. *See id.* § 707(b)(2)(B)(i) (providing examples of "special circumstances" such as serious medical condition or call to active duty in armed forces).

253. 404 B.R. 577 (Bankr. N.D. Ga. 2006).

254. *In re Clemons*, 404 B.R. at 582.

255. *Clemons* even states that "the authority to adjust [historical income] in a Chapter 7 case is not . . . directly applicable to a Chapter 13 case." *Id.*

256. BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004).

257. *See In re* Alexander, 344 B.R. 742, 748 (Bankr. E.D.N.C. 2006) (stating that it is Congress's job to amend statute if unintended results occur); Waldron & Berman, *supra* note 25, at 224 (noting that resolution lies in congressional amendment or Supreme Court resolution). Notably, a senator proposed amendments to apply the "special circumstances" provision to Chapter 13 debtors, but later withdrew them. *In re Clemons*, 404 B.R. at 582.

258. 377 B.R. 777 (Bankr. D.N.H. 2007).

259. *In re Ries*, 377 B.R. at 784–85 (finding that only debtors can invoke "special circumstances" provision because debtors bear burden of proof). See *supra* note 81 for the statutory text of § 707(b)(2)(B)(ii)(I), (II).

260. See *supra* notes 16–17 and accompanying text for a discussion of the facts of the Jasses' case. On the other hand, Ms. Kibbe and Mr. Pak would not invoke the "special circumstances" provision because their anticipated income is higher than their historical income. See *supra* notes 9–15 and accompanying text for a discussion of the facts of the Kibbe and Pak cases. Under *Ries*, creditors, trustees, and courts are not able to invoke this privilege to force debtors to pay a higher income figure. *In re Ries*, 377 B.R. at 784–85.

261. 11 U.S.C. §§ 1323, 1329 (2006 & Supp. I 2007).

BAPCPA requires the use of anticipated income.[262] These courts, however, fail to acknowledge that there are many reasons for modification of the plan other than a change in income.[263] Section 1323 does not address specific reasons for modification of the plan and only states that the debtor can modify the plan.[264] For example, a debtor may modify the plan before confirmation to surrender a secured item.[265] A debtor may also modify the plan to change the duration of the plan.[266] These two examples illustrate that there are numerous things that debtors could modify in the plan preconfirmation without modifying income.

Section 1329 lists reasons for modification of the plan after confirmation, which include changing the plan payment, changing the length of the plan, and changing the distribution to a creditor.[267] Clearly, § 1329 lists reasons for postconfirmation modification that do not involve a change in income.[268] While a modification to the plan payment may be due to a change in income, it also may be due to a change in expenses. These other reasons for postconfirmation modification, instead of a change in income, negate arguments that the use of historical income renders § 1329 surplusage.[269]

Even if a debtor has a change in income, BAPCPA only requires historical income at the time of confirmation of the plan because § 1329 does not require § 1325(b) to apply to postconfirmation modifications.[270] Section 1325(b)(2)'s

262. *See, e.g.*, *In re* Grady, 343 B.R. 747, 751–52 (Bankr. N.D. Ga. 2006) (relying upon §§ 1323 and 1329 to find intent for flexibility that allows use of anticipated income). See *supra* Part II.B.3.a for a discussion of courts holding that BAPCPA requires the use of anticipated income due to pre- and postconfirmation modification provisions.

263. *See In re* Briscoe, 374 B.R. 1, 16 (Bankr. D.D.C. 2007) (observing that § 1329 permits modification based on change in financial circumstances but fails to address reasons for change of circumstances that may not involve income); *In re* Mullen, 369 B.R. 25, 33 (Bankr. D. Or. 2007) (noting only modification on basis of reduction in income); *In re* Zimmerman, No. 06-31086, 2007 Bankr. LEXIS 410, at *19 (Bankr. N.D. Ohio Jan. 29, 2007) (mentioning change of financial circumstances but not discussing what that includes); *In re Grady*, 343 B.R. at 752 (discussing only modification as indicator of flexibility and focusing on flexibility to include use of anticipated income, not for any other basis).

264. 11 U.S.C. § 1323. See *supra* note 73 for the relevant text of § 1323.

265. *See, e.g.*, First Amended Chapter 13 Plan at 16, *In re* Ferguson, No. 07-20979 (Bankr. S.D. Fla. Jan. 14, 2008) (amending plan prior to confirmation to surrender secured item); First Amended Chapter 13 Plan at 11, *In re* Garcia, No. 07-44319 (Bankr. N.D. Cal. Jan. 11, 2008) (amending plan preconfirmation to surrender secured item).

266. *See, e.g.*, Amended Chapter 13 Plan at 35, *In re* Corcoran, No. 07-14768 (Bankr. D. Mass. Jan. 22, 2008) (amending plan prior to confirmation to change length of plan from thirty-six to sixty months).

267. For a list of the reasons that permit plan modification following confirmation, see 11 U.S.C. § 1329(a)(1)–(4). Such reasons include: (1) to increase or decrease the plan payments to a particular creditor class, (2) to extend or reduce the length of the plan, (3) to alter distribution to a creditor based on other payments made outside of the plan, and (4) to reduce payment amounts to purchase health insurance for the debtor or dependents. *Id.*

268. Changing the length of the plan or the distribution to a specific creditor does not imply that a debtor's income changed.

269. *See In re* Mullen, 369 B.R. 25, 33 (Bankr. D. Or. 2007) (stating that use of historical income renders § 1329 moot).

270. 11 U.S.C. § 1329(b). See *supra* note 153 for sections that apply to postconfirmation

inapplicability to postconfirmation modifications clearly indicates a congressional intent to allow for a modification due to a change in income, which some courts rely upon to find that BAPCPA requires the use of historical income only at the time of confirmation.[271] Further support of this position is § 1325(b) itself, which only applies when a creditor or the trustee raises an objection to the confirmation of a plan, not after the plan is confirmed.[272] As *In re Hanks*[273] noted, "[w]hat may or may not be permitted following confirmation of a plan is not instructive on what must be done at . . . confirmation."[274] Thus, if historical income only applies at the time of confirmation, the Jasses could file a motion to modify their plan after confirmation to decrease their payment, and creditors or the trustee could file a motion to modify Ms. Kibbe's and Mr. Pak's plans to reflect the increase in income.[275]

d. The Definition of "Current Monthly Income" Requires the Use of Historical Income

Section 101(10A) provides a second historical definition of "current monthly income" that the court calculates from the six-month period preceding the date of calculation if the debtor fails to file the statement of current income.[276] *Clemons* argues that the second definition of "current monthly income" in § 101(10A)(A)(ii) "strongly suggest[s] that Congress intended . . . to use prepetition income as a starting point."[277] However, *Clemons* recognizes, yet fails to apply, the practice that the definition under subpart (ii) only applies if the debtor fails to file the appropriate form to report current income.[278] Most courts

modifications. Additional sections of the code also indicate that BAPCPA only requires historical income at confirmation. For example, some courts find that requirements for tax returns and statements of future income indicate that BAPCPA requires the use of anticipated income. *In re* Arsenault, 370 B.R. 845, 851 (Bankr. M.D. Fla. 2007) (finding that use of anticipated income gives effect to these requirements); *In re* Davis, 348 B.R. 449, 458 (Bankr. E.D. Mich. 2006) (noting that use of historical income is inconsistent with these requirements). But courts finding for the use of historical income at confirmation find that these requirements, combined with the availability of postconfirmation modification, indicate congressional intent to adjust income after confirmation. *See In re* Girodes, 350 B.R. 31, 38 (Bankr. M.D.N.C. 2006) (finding that use of historical income for duration of plan renders requirement to submit tax returns to trustee moot).

271. *See In re* Ireland, 366 B.R. 27, 31–32 (Bankr. W.D. Ark. 2007) (finding that § 1325(b)(2) and (3) do not apply to postconfirmation modifications); *In re Girodes*, 350 B.R. at 38 (noting that other sections of bankruptcy code, such as requirement to file tax returns, indicate use of historical income only at confirmation).

272. 11 U.S.C. § 1325(b) (2006 & Supp. I 2007). Objections to postconfirmation modifications are not handled through § 1325(b). Section 1329 specifically provides for a notice and hearing regarding postconfirmation modifications. *Id.* § 1329(b)(2).

273. 362 B.R. 494 (Bankr. D. Utah 2007).

274. *In re Hanks*, 362 B.R. at 502 n.30.

275. See *supra* notes 9–15 and accompanying text for a discussion of the facts of the debtors' cases.

276. 11 U.S.C. § 101(10A)(A)(ii).

277. *In re* Clemons, 404 B.R. 577, 582 (Bankr. N.D. Ga. 2006).

278. 11 U.S.C § 101(10A)(A)(ii). The pertinent statutory language is as follows:

The term "current monthly income" . . . means the average monthly income from all sources

that support the use of anticipated income do so because of a fear that debtors will abuse the bankruptcy system and to ensure that debtors pay all they can afford to pay.[279] A debtor who tries to abuse the bankruptcy system will likely file the proper form because the debtor will have more control over the calculation of income by filing it than by allowing the court to determine it.[280] For this reason, it is not likely that Congress expected the definition under subpart (ii) to curtail abuse and, thus, the conclusion that the definition under subpart (ii) allows the use of anticipated income is inconclusive.

Even when the debtor fails to file the statement of current income, requiring the court to determine "current monthly income" under § 101(10A)(A)(ii), that figure is still the average monthly income from a six-month period.[281] "Current monthly income" is a historical, backward-looking figure whether debtors calculate it pursuant to subpart (i) or if courts calculate it pursuant to subpart (ii) of § 101(10A)(A).[282] Section 101(10A)(A) does not give any indication that courts can adjust the "current monthly income" on a whim even under subpart (ii).[283]

e. Other Sections That Indicate Congressional Intent to Use Historical Income

Other new provisions of BAPCPA indicate congressional intent to rely upon a debtor's historical income. Section 109(h) requires debtors, within the six months preceding the bankruptcy filing, to receive a briefing that outlines "opportunities for available credit counseling" and to complete a budget analysis.[284] Subsections 521(b)(1) and (2) require debtors to submit both a certificate of completion of this briefing session, as well as the budget analysis.[285] As *Hanks* noted, these new requirements under BAPCPA that focus on pre-petition efforts in the six months prior to filing indicate a congressional "intent

> that the debtor receives . . . derived during the 6-month period ending on . . . the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required . . . .

Id. See *supra* Part II.B.3.c for a discussion of the *Clemons* position.

279. *See, e.g.*, Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 314 (B.A.P. 1st Cir. 2007) (noting that legislative history indicates purpose is to ensure debtors pay all they can afford to pay); *In re* Hardacre, 338 B.R. 718, 720 (Bankr. N.D. Tex. 2006) (noting congressional intent to address abuse of bankruptcy process).

280. Courts recognize that debtors can time the filing of the bankruptcy petition to control the "current monthly income" figure. *E.g.*, *In re* Riggs, 359 B.R. 649, 651–52 (Bankr. E.D. Ky. 2007) (noting that historical income allows manipulation of system). See *supra* note 45 and accompanying text for a discussion regarding manipulation through timing of the filing.

281. 11 U.S.C. § 101(10A)(A)(i)–(ii) (providing for calculation of income during six-month period in § 101(10A)(A), then providing two methods to determine what six-month period courts and debtors use in subparts (i) and (ii)).

282. *Id.*

283. *Id.*

284. *Id.* § 109(h).

285. *Id.* § 521(b)(1)–(2).

[for] debtors [to resolve] financial difficulties outside of bankruptcy."[286] Such a focus on these new pre-petition requirements, as well as Congress's new mandate for the use of historical income derived from an average of income received within the six months preceding the bankruptcy filing,[287] indicates that Congress recognized that this six-month period preceding bankruptcy is important to determine the debtors' eligibility to file bankruptcy and their ability to pay. These sections also indicate a congressional intent to review this six-month period in order to develop a plan consistent with the events leading to the filing of the bankruptcy. The use of historical income is part of Congress's new statutory scheme to focus on this six-month time period preceding the bankruptcy filing as a means to consistently measure each debtor's ability to repay creditors.

C. The Use of Historical Income Does Not Result in Absurdity

Many courts, such as *Hardacre* and *Jass*, base the use of anticipated income on the absurd results that can occur if BAPCPA requires solely the use of historical income.[288] In fact, *Pak* notes that the only way for an interpretation of projected disposable income "not to degenerate into absurdity" is to allow the calculation of projected disposable income to include anticipated income.[289] Judge Federman, in *In re Riding*,[290] best summarizes one side of the predicament, where a debtor's historical income is higher than anticipated income, with the following:

> The result here is that the Debtor is in the difficult position of having to propose a plan that will, most likely, not be confirmed because it is not feasible, since it appears she will be unable to make the payments she is required to make under § 1325(b). On the other hand, if she converts her case to Chapter 7 due to her apparent inability to propose a workable plan that complies with § 1325(b), she will then be subject to the United States Trustee's scrutiny under § 707(b)'s presumption of abuse because the forms show she can make payments to her unsecured creditors. . . . Consequently, the possibility exists that the Debtor could be in a position where she is not eligible for Chapter 7 because she can pay something to her unsecured creditors, but she cannot possibly propose a confirmable plan [using historical income that] is feasible.[291]

286. *In re* Hanks, 362 B.R. 494, 500 (Bankr. D. Utah 2007), *abrogated by In re* Lanning, 545 F.3d 1269, 1277–78, 1282 (10th Cir. 2008).

287. 11 U.S.C. §101(10A).

288. *In re* Jass, 340 B.R. 411, 417–18 (Bankr. D. Utah 2006) (noting that use of historical income forecloses some other otherwise eligible debtors from bankruptcy); *In re* Hardacre, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006) (noting that debtor with lower anticipated income may not be able to confirm plan).

289. Pak v. eCast Settlement Corp. (*In re* Pak), 378 B.R. 257, 267 (B.A.P. 9th Cir. 2007), *abrogated by* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868 (9th Cir. 2008).

290. 377 B.R. 239 (Bankr. W.D. Mo. 2007).

291. *In re Riding*, 377 B.R. at 242–43 (footnotes omitted). In *Riding*, the debtor's historical income was higher than her anticipated income. *Id.* at 240–41.

While the canons of statutory interpretation discourage the adoption of an interpretation that leads to an absurd result,[292] an absurd result does not occur if one interprets BAPCPA to require the use of historical income. While Judge Federman and the majority present a persuasive argument, that argument fails to address one key fact. If the use of historical income forecloses a debtor from Chapter 13 because that debtor has a significant decrease in anticipated income as compared to historical income, then the debtor, in converting to Chapter 7, can utilize § 707(b)(2)(B) which allows the debtor to invoke the "special circumstances" provision to prove a change of income.[293] It is not absurd that BAPCPA may force a debtor to convert to Chapter 7. In fact, the entire "presumption of abuse" test in § 707 is aimed at the goal of converting abusive debtors to Chapter 13.[294] Thus, the Jasses, upon conversion to Chapter 7, would invoke the "special circumstances" provision and provide evidence of their decrease in income.[295]

In the other predicament, where a debtor's anticipated income is higher than the historical income, as in the cases of Karen Kibbe and John Pak,[296] the result that a debtor does not pay all anticipated income is also not absurd because the language of BAPCPA and the legislative history indicate that Congress did not intend to include all income.[297] As *In re Nance*[298] notes, the use of historical income is not absurd "simply because it leads to results that are not aligned with the old law."[299] As *Nance* suggests, when courts determine that

292. Kibbe v. Sumski (*In re* Kibbe), 361 B.R. 302, 313 (B.A.P. 1st Cir. 2007) (citing Gen. Motors Corp. v. Darling's, 444 F.3d 98, 108 (1st Cir. 2006)).

293. See *supra* notes 80–82 and accompanying text for a discussion of the "special circumstances" provision for Chapter 7 debtors. See *supra* Part III.B.2.b for a discussion of the "special circumstances" provision's inapplicability to Chapter 13 debtors' income. Specifically, Judge Federman noted that the debtor in *Riding* claimed that her change in income constituted a "special circumstance" and he briefly discussed the applicability of the "special circumstances" to Chapter 7, while rejecting its use for Chapter 13 debtors' income. *In re Riding*, 377 B.R. at 241 n.3. Judge Federman, however, failed to mention that debtors forced to convert to Chapter 7 may then employ "special circumstances" for a change in income. *Id.*

294. *See* 11 U.S.C. § 707 (2006 & Supp. I 2007) (titling § 707 "Dismissal of a case or conversion to a case under Chapter 11 or 13").

295. See *supra* note 17 and accompanying text for a discussion of the facts of the Jasses' case.

296. See *supra* notes 9–17 and accompanying text for a discussion of the facts of the debtors' cases.

297. See *supra* Part III.B for a discussion of the legislative history and statutory provisions that support Congress's intent for BAPCPA to require the use of historical income. Further, courts can also reconcile this predicament through the use of postconfirmation modifications that do not require the use of historical income. See *supra* Parts II.C.3 and III.B.2.e for discussions of the use of historical income only at the time of confirmation.

298. 371 B.R. 358 (Bankr. S.D. Ill. 2007) .

299. *In re Nance*, 371 B.R. at 367 (quoting *In re* Alexander, 344 B.R. 742, 747 (Bankr. E.D.N.C. 2006)); *see also* Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868, 875 (9th Cir. 2008) (finding no absurdity in new "disposable income" calculation simply because it produces results different from pre-BAPCPA practices and refusing to "de-couple 'disposable income' from the 'projected disposable income' calculation simply to arrive at a more favorable result for unsecured creditors").

debtors must pay anticipated income, the court manipulates the statutory text of BAPCPA to achieve the desired result of favoring pre-BAPCPA practices.[300]

IV. CONCLUSION

BAPCPA's[301] language in § 1325 unambiguously mandates the use of historical income in the calculation of projected disposable income.[302] The majority courts that find for the use of anticipated income clearly fail to consider the plain meaning of the statutory language of § 1325 by distorting the meanings of the term "projected" and the phrases "to be received" and "as of the effective date of the plan."[303] Thus, the majority overtly manipulates the interpretation of statutory text to achieve the desired result of using prior practices.[304] When Congress enacted BAPCPA, it intended to "implement[] . . . an income/expense screening mechanism."[305] The majority simply cannot revert to pre-BAPCPA practices and still implement an income/expense screening mechanism to follow BAPCPA.

Further, the majority also distorts the intent of Congress in enacting BAPCPA by quoting only snippets of full sentences which exclude pertinent language relating to Congress's intent to impose new practices, not re-employ the pre-BAPCPA practices.[306] The majority also fails to recognize that numerous provisions outside of § 1325 support the use of historical income rather than anticipated income.[307] In fact, the minority utilizes all the statutory text cited by the majority in support of the use of anticipated income, for the support of the use of historical income.[308] Finally, the use of historical income does not cause absurd results that are repugnant to the rest of BAPCPA. Even though the majority devises absurd results to support the use of anticipated income, these results have solutions that follow the statutory scheme of BAPCPA in a much clearer method than the majority employs.[309]

Under the proposal set forth in this Comment, debtors like Ms. Kibbe, Mr. Pak, the Jasses, the Roberts, and the Thomases would uniformly calculate

300. See *supra* notes 30–32 and accompanying text for a discussion of pre-BAPCPA practices.

301. Pub. L. No. 109-8, 119 Stat. 23 (codified in 11 U.S.C. and scattered sections of 12, 18, 28 U.S.C.).

302. See *supra* Part III.A.1 for a discussion of the plain meaning of § 1325(b)(1)(B).

303. See *supra* Parts III.A.2–5 for a discussion of the majority's manipulation of statutory interpretation to achieve the desired result of using anticipated income.

304. See *supra* Part III.A.5 for a discussion of the majority's overt manipulation.

305. H.R. REP. NO. 109-31, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

306. See *supra* Part III.B.1 for a discussion of the majority's distortion of legislative history to support the use of anticipated income.

307. See *supra* Part III.B.2 for a discussion of statutory text outside § 1325 that supports the use of historical income.

308. See *supra* Part III.B.2 for a discussion of the majority's failure to recognize that statutory text outside § 1325 supports the use of historical income. See *supra* Part II.C.2 for a discussion of the minority's use of text outside § 1325 to support the use of historical income.

309. See *supra* Part III.C for a discussion of how the use of historical income does not cause absurd results.

projected disposable income using their historical income pursuant to BAPCPA.[310] For Ms. Kibbe, Mr. Pak, and the Thomases, since their historical income is lower than their anticipated income, these debtors would have the choice of only committing their lower historical income figure or voluntarily committing their higher anticipated income figure.[311] For the Jasses and the Roberts, since their historical income is higher than their anticipated income, these debtors would be unable to feasibly commit all of their projected disposable income and, thus, would convert their bankruptcy case to Chapter 7 and employ the use of "special circumstances" under § 707(b)(2)(B) to rebut the presumption of abuse.[312] In the three instances adjudicated by the majority courts, they attempt to avoid these results for Ms. Kibbe, Mr. Pak, and the Jasses, but doing so circumvents the mandate set forth in BAPCPA.

Clearly, the majority chooses to ignore BAPCPA.[313] This is unfortunate because Congress intended, no matter what criticisms are made regarding BAPCPA,[314] to implement a new calculation of projected disposable income.[315] Only Congress has the ability to amend the statute and, absent such an amendment, courts should commit to BAPCPA, rather than amend the statute on their own.[316] Regrettably, the majority courts believe that they know better than the esteemed legislators elected by the citizens of the United States. Ultimately, if Congress does not wish to amend BAPCPA, the Supreme Court likely will review this issue. Perhaps the highest court of this country can do what the majority of bankruptcy courts cannot: interpret the plain meaning of § 1325(b)(1)(B) of Title 11.

Candice L. Marple[*]

310. See *supra* Part I for a discussion of the Roberts and the Thomases. See *supra* notes 9–17 and accompanying text for a discussion of the cases of Ms. Kibbe, Mr. Pak, and the Jasses. See *supra* Part III for a discussion regarding the proposal encouraged by this Comment.

311. See *supra* Part I for a discussion of the Roberts' case. See *supra* notes 9–15 and accompanying text for a discussion of Ms. Kibbe and Mr. Pak's cases.

312. See *supra* Part I for a discussion of the Thomases' case. See *supra* notes 16–17 and accompanying text for a discussion of the Jasses' case. See *supra* notes 292–95 and accompanying text for a discussion of the application of § 707(b)(2)(B) for a debtor with a decrease in anticipated income.

313. See *supra* Part III for a discussion of the majority's failure to recognize the new calculation of "projected disposable income" implemented by BAPCPA.

314. See *supra* notes 22–24 and accompanying text for a discussion of criticisms of BAPCPA.

315. *See* H.R. REP. NO. 109-31, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89 (using process for screening based on "income/expense").

316. *See In re* Alexander, 344 B.R. 742, 748 (Bankr. E.D.N.C. 2006) (stating that it is Congress's job to amend statute if unintended results occur).

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