Disposable Income vs. Projected Disposable Income: Identical Twins or Distant Relatives?

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Since its inception, the foundation of chapter 13 has been to provide wage-earning debtors with a means to reorganize their debts over a 3- to 5-year period by taking their monthly income, deducting reasonably necessary expenses, and using the resulting "excess income"[1] to pay creditors. After approximately 25 years of practice and refinement, the calculation of a debtor's excess income and the amount to be paid into the plan and to unsecured creditors became a fairly predictable process within the local legal culture of each District. However, with the recent enactment of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the calculation of a debtor's excess income has become complicated, confusing and arguably unfair.

Before BAPCPA,[2] the so-called "disposable income test" of §1325(b) provided that if the debtor proposed less than a 100 percent plan, and the trustee or an unsecured creditor objected, then the plan had to provide that all of the debtor's "projected disposable income" would be "applied to make payments under the plan." Projected disposable income was calculated by listing all income on schedule I and deducting all reasonably necessary expenses on schedule J. The resulting sum became the plan payment that was multiplied by the 3- to 5-year term of the plan to arrive at the total amount needed to fund the plan.[3]

BAPCPA changed the "disposable income test" in the following regards: (1) income is no longer based on current revenue but on average revenue received over the past six months; (2) for debtors with income above the state's median, deductions are no longer based on actual expenses but by reference to the IRS Local and National Standards; and (3) the return to "unsecured creditors"[4] is based on monthly projected disposable income multiplied by the 3- to 5-year

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[1] In an attempt to avoid the semantic confusion that is at the center of this issue, I will use the term "excess income" rather than "disposable income" to colloquially refer to income available to a debtor after the payment of reasonably necessary expenses. This is the phrase used on the pre-BAPCPA schedule J to identify the sum of income less expenses.

[2] At least one bankruptcy judge has called pre-BAPCPA "the good old days." *In re Renicker*, 342 B.R. 304, 307 (Bankr. W.D. Mo. 2006). Most bankruptcy practitioners would agree.

[3] For example, if the debtor had $1,000 in income on schedule I and $800 in expenses on schedule J, then the monthly amount to be paid into the plan would be $200. If the debtor was proposing a 36-month plan, the total to be paid into the plan was $7,200.

[4] Whether the term "unsecured creditors" used in §1325(b)(1)(B) refers to all unsecured claims, including attorney's fees and priority claims, or whether it is limited to nonpriority unsecured claims is an issue for another day. *See*, *In re Wilbur*, 344 B.R. 650 (Bankr. D. Utah 2006) ("The court believes implementing the plain meaning of 'unsecured creditors' under §1325(b)(1)(B) would be contrary to Congress's manifest intent and would yield an absurd result. Therefore, the court will interpret 'unsecured creditors' to refer to non-priority unsecured creditors only.")

applicable commitment period of the plan. The effect of these changes on computing projected disposable income, the amount of the monthly plan payment, and the return to unsecured creditors is substantial.

In applying BAPCPA's new disposable income test, some courts have articulated a material difference between the meaning of "projected disposable income" under §1325(b)(1) and "disposable income" under §1325(b)(2). While the end result under these two concepts may be the same, there can be a significant difference depending on whether the debtors are above or below the state's median income or whether debtors have experienced changes to their financial situation in proximity to the bankruptcy filing. This article will outline the issues and review recent case law regarding the apparent tension between the meaning of "disposable income" and "projected disposable income."

BAPCPA Changes to the Concepts of Income and Expenses in Chapter 13

BAPCPA modified and added to the vocabulary associated with the disposable income test in the following regards.

Current Monthly Income. BAPCPA provides a new and detailed definition of what constitutes a debtor's income. Section 101(10A) defines "current monthly income" (CMI) as the average of all monthly income from all sources received by a debtor within the six-month period[5] prior to the bankruptcy filing. CMI excludes Social Security benefits or restitution as a victim of war or terrorism. In chapter 13, CMI also excludes income from alimony, child support, foster care, and child disability payments.[6] CMI is calculated by having all chapter 13 debtors complete lines 1-23 of Form B22C, with the result being listed on line 21 as the "annualized current monthly income for §1325(b)(3)" (ACMI).[7]

Disposable Income. This term is defined in §1325(b)(2) as the debtor's CMI "less amounts reasonably necessary to be expended for the maintenance or support of the debtor…." Pre-BAPCPA, disposable income was computed by listing income on schedule I and deducting allowable expenses on schedule J. BAPCPA modified this approach by devising two tracks for computing disposable income based on whether the debtor's income is above or below the median income of the applicable state.

Above-The-Median Debtors. If ACMI is greater then the state's median income for a household of the same size, reasonably necessary expenses are calculated using the so-called "means test" of §707(b)(2). The means test is an involved subject in itself, but it essentially attempts a uniform

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[5] Technically, this is the "6-month period ending on – (i) the last day of the calendar month immediately preceding the date of the commencement of the case … or (ii) the date on which current income is determined by the court if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii)."

[6] Section 1325(b)(2): "For purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended…."

[7] As has been observed by **Henry E. Hildebrand III**, CMI is often "neither current, nor monthly, nor income."

and objective[8] approach to determining reasonably necessary expenses by applying the standardized IRS guidelines for living costs, as developed in the Offer In Compromise Program.[9] The complex calculations of the means test are performed by having the debtor complete lines 24 through 58 of Form B22C and then listing the resulting sum on line 58 captioned "Monthly Disposable Income under §1325(b)(2)."

Below-the-Median Debtors. If ACMI is less than the state's median income, the debtor is finished with Form B22C and proceeds to list income and expenses on schedules I & J. BAPCPA does not specify a particular standard for determining the reasonableness of expenses for below-the-median debtors, and for the moment courts are applying the locally-developed standards of reasonably necessary expenses that existed prior to BAPCPA.[10] There has been some debate that as a matter of fairness the IRS standards employed in the Means test should be applied to below-the-median debtors so that the calculation of disposable income for both above and below the median debtors is approximately the same. There has also been a suggestion that all debtors, regardless of income, should complete Form B22C in its entirety. [11]

Projected Disposable Income. Originally, projected disposable income under §1325(b)(1) was the amount "to make payments under the plan" if the debtor was proposing less than a 100 percent plan and the trustee or an unsecured creditor objected. BAPCPA modified this section to provide that "projected disposable income" is now what is paid to "unsecured creditors." Specifically, projected disposable income is multiplied by the Applicable Commitment Period (36 or 60 months),[12] and the resulting product is the amount that must be distributed to unsecured creditors.[13]

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[8] Prof. Todd Zywicki, an adamant supporter of BAPCPA, pointed out that the purpose of the means test was to "eliminate the subjective judicial navel-gazing" at a debtor's expenses. *See National Review Online, March 15, 2005.*

[9] "An offer in compromise is an agreement between a taxpayer and the IRS that resolves the taxpayer's tax debt. The IRS has the authority to settle, or 'compromise,' federal tax liabilities by accepting less than full payment under certain circumstances." IRS Form 656 - *Offer in Compromise*

[10] *See In re Nevitt*, 2006 WL 2433491 (Bankr. N.D. Ill. 2006) ("This court previously held that schedule I, instead of Form B22C, should be used to calculate projected disposable income [for below-the-median debtors]"; *In re Dew*, 344 B.R. 655 (Bankr. N.D. Ala. 2006) (for below-the-median debtors, schedules I & J determine "projected disposable income"); *In re Fuller*, 2006 WL 2096484 (Bankr. S.D. Ill. 2006); and *In re Quarterman*, 342 B.R. 647 (Bankr. M.D. Fla. 2006).

[11] In a comment dated on March 13, 2006, to the Committee on Rules of Practice and Procedure regarding the Interim Bankruptcy Rules and Official Forms, Senators Charles Grassely and Jeff Sessions asserted that Form B22A (the chapter 7 cases means test form) should be amended to require both above and below the median debtors to complete the entire form to "provide the needs-based calculations" since "Congress specifically chose not to create such an exemption [for debtor's who are below the state median income]." Presumably, if such a change is made to the chapter 7 Form B22A, it will be carried over to the chapter 13 Form B22C, and all debtors would be required to complete Form B22C in its entirety.

[12]In general, if a debtor's CMI is below the median income, the applicable commitment period is "3 years." If the CMI is above the median, the applicable commitment period is "5 years."

[13] 11 U.S.C. §1325(b)(1)(B).

Pre-BAPCPA, there was no reason to distinguish between "projected disposable income" and "disposable income" since there was only one calculation – subtract allowable expenses on schedule J from income on schedule I. Under BAPCPA, there are now two tracks for calculating a debtor's excess income in that all debtors must now complete lines 1-23 of Form B22C *and* schedules I & J, while only above-the-median debtors must complete the remainder of Form B22C. This bifurcated approach is what has lead courts to find that "disposable income" is something different than "projected disposable income."

Differences between Form B22C and Schedules I & J.

The crux of the confusion is the substantial difference between how excess income is calculated under Form B22C and how it is calculated under schedules I & J.[14] While the income listed on the two forms will often be the same, it is not uncommon for a debtor's CMI to be different than the "average monthly income" on schedule I, and it is a veritable certainty that the sum of expenses on B22C will be different than the sum calculated by schedule J. As a result, the "monthly disposable income" listed on line 58 of B22C will *almost never* be the same as the "monthly net income" listed on schedule J.[15] A summary of the differences between B22C and schedules I & J is set forth in the following table.

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[14] It should be noted that there does not yet appear to be any confusion regarding the use of Form B22C to calculate the applicable commitment period. *See In re Beasley*, 342 B.R. 280, 284 (Bankr. C.D. Ill. 2006), where the court found that the statutory formula to calculate the applicable commitment period was "fully-dispositive" of the issue even though it would lead to anomalous results:

> In making this finding, the court is cognizant of the fact that strict compliance with the definition of current monthly income means that some debtors with high but irregular income may be able to avoid the imposition of the longer payment period by the timing of their filings, while debtors with lower incomes are forced to pay for five years. That may be unfair, but that is what the statute requires as it is currently written. The remedy for that problem is legislative, not judicial.

[15] *See In re McGuire*, 342 B.R. 608, 610 (Bankr. W.D. Mo.) ("the disposable income numbers differ between the schedules and Form B22C because the former use actual figures, whereas the latter calculates income on a historical average and calculates expenses based largely on the national and local standards established by the Internal Revenue Service."); and *In re Schanuth*, 342 B.R. 601, 603 (Bankr. W.D. Mo.) (the expenses on B22C differ from schedule J "because schedule J is a report of actual expenses, whereas Form B22C calculates a debtor's expenses largely by reference to I.R.S. national and local standards which, in this case, exceed the debtors' actual expenses in several categories.")

Line Item	**B22C**	**Schedules I & J**
Calculation of Income	Lines 1-23 of B22C calculate a debtor's ACMI by starting with average monthly income received during the past six months but *excluding* Social Security or restitution payments to victims of war or terrorism. See §101(10A)).	Schedule I requires a listing of "estimated average monthly income." The cases cited below have interpreted this to mean a debtor's post-petition income. Note that schedule I does not allow a deduction for Social Security benefits or restitution payments to victims of war or terrorism.
Deduction of Family Support Income	Line 54 of B22C allows a debtor to deduct from CMI any income received for child support, foster care, or disability for a dependent child.	Schedule I does not contain a deduction for such family support income.
Deduction of Living Expenses	On B22C, debtors do not deduct their actual living expenses but rather the amount allowed by the IRS guidelines. For most districts, the IRS guidelines are more generous than the "reasonably necessary" standards developed under pre-BAPCPA law.	Schedule J has no provision for incorporating the IRS guidelines, and it appears that deductions on Schedule J are limited to actual expenses.
Deduction of Mortgage and Car Payments	B22C allows a debtor to deduct the greater of the IRS allowance or the actual mortgage and car payments. This can result in a windfall to some debtors.	While schedule J includes a deduction for post-petition mortgage payments, post-petition car payments can only be deducted if they are paid outside of the plan.
Deduction of Cure Payments on Pre-petition Defaults	B22C allows a debtor to deduct the amount of default-cure payments on a home or car in order for the debtor to retain possession of such collateral. Generally, cure payments must be made through the plan	Schedule J does not contain a deduction for default-cure payments made through the plan.
Deduction for Priority and Administrative Expenses	B22C allows a debtor to deduct the amount required to pay the trustee fee, attorney's fees, and priority claims.	Schedule J does not contain a deduction for such claims.

The first problem with BAPCPA's bifurcated approach to the disposable income calculation is that it can result in substantially different sums for similarly situated debtors. Consider the following example: Debtor A and Debtor B have ACMIs that differ by $2 annually, such that Debtor A's ACMI is $36,001, which is $1 *above* the medium income, while Debtor B's ACMI is $35,999, which is $1 *below* the medium income. Both Debtors A and B are the sole members of their respective households; they have identical assets, debts and expenses; and their chapter 13 plans require a payment of $500 per month for 36 months to pay all priority and secured claims. The following charts demonstrate what a difference $2 can make under BAPCPA:

Line Item	**Debtor A - B22C**	**Debtor B - Schedules I & J**
Annualized Current Monthly Income	Debtor A's annual income is $1 above the state's median income, so he must complete all of B22C (lines 1-59).	Debtor B's annual income is $1 below the median income, so he only completes lines 1-23 of B22C, and his expenses are only listed on Schedule J.
Living Expenses	Debtor A has actual expenses for food, clothing, personal care, housekeeping supplies and miscellaneous items of $603; however, B22C allows him to deduct the full IRS allowance of $703 for such expenses.	Debtor B can only deduct his actual expenses of $603.
Mortgage and Utility Expenses	Debtor A has an actual mortgage payment of $800 and monthly utility expenses of $200, for a total expense of $1,000; however, the IRS standard allows him to deduct $1,500 for mortgage and utility expenses.	Debtor B can only deduct his actual mortgage and utility expenses of $1,000.
Vehicle Ownership Expenses	Debtor A has a car loan payment of $371 per month, but the IRS standard allows him to deduct $471.	Debtor B can only deduct his actual expense of $371.
Transportation Expenses	Debtor A spends $238 a month on transportation, but the IRS standard allows him to deduct $338.	Debtor B can only deduct his actual expense of $238.
Payments on Mortgage Default Claim	Debtor A has a pre-petition mortgage default of $6,000. B22C allows him to deduct this amount divided by 60, or $100 per month.	Schedule J does not contain a line item for Debtor B to deduct payments on the mortgage default claim.
Priority	Debtor A owes priority taxes of $6,000. B22C allows him to deduct this claim	Schedule J does not contain a line item for Debtor B to deduct

Claims	divided by 60, or $100 per month.	payments on the priority tax claim.
Chapter 13 Administrative Expenses	Debtor A estimates his chapter 13 plan payments to be $500 per month. B22C allows him to deduct the trustee's 10% fee, or $50 per month.	Schedule J does not contain a line item for Debtor B to deduct the trustee's fee.
Excess Income	The resulting sum on line 58 of B22C is a negative $262.	The resulting sum on Schedule J is $788.

SUMMARY OF FORM B22C AND SCHEDULES I & J

Line Item	**Debtor A B22C**	**Debtor A Sch. I & J**	**Debtor B Sch. I & J**
Current Monthly Income	$3,000	$3,000	$3,000
Living Expenses	$703	$603	$603
Mortgage and Utility Expenses	$1,500	$1,000	$1,000
Vehicle Ownership Expenses (car payments)	$471	$371	$371
Transportation Expenses	$338	$238	$238
Payments on Mortgage Default Claim	$100	$0.00	$0.00
Payments on Priority Claims	$100	$0.00	$0.00
Chapter 13 Administrative Expenses	$50	$0.00	$0.00
Excess Income	-$262	$788	$788
Monthly Plan Payment Required to Satisfy Secured and Priority Claims	N/A[16]	$500	$500
Monthly Amount Left to Pay Unsecured Creditors	$0.00	$288	$288
Possible Distribution to Unsecured Creditors (Excess Income Times Applicable Commitment Period).	$0.00	$288 x 60 = $17,280	$288 x 36 = $10,368
Distribution to Unsecured Creditors Required by §1325(b)(1)	$0.00	$0.00	$10,368

[16] Form B22C already deducts the chapter 13 plan payment required to pay administrative, secured, and priority claims.

Under a strict reading of §1325(b), Debtor A does not need to make a distribution to unsecured creditors because he has no disposable income under Form B22C. This result seems incongruous with the spirit of chapter 13 when schedules I & J show Debtor A with excess monthly income of $288, even after making the $500 plan payment. If Debtor A paid such excess income into the plan over the applicable commitment period of five years, he would return $17,280 to unsecured creditors!

In contrast, Debtor B must pay at least $10,368 ($288 x 36) to unsecured creditors because schedules I & J show excess income of $288 a month after paying administrative, secured and priority claims. Could Congress have intended that Debtor B, who makes $2 less a year than Debtor A, pay $10,368 more to unsecured creditors?

The second problem between B22C and schedules I & J is more easily demonstrated. During the past six months, Debtor A made $10,000 per month, but a week ago, he took a new job that only pays $5,000 per month. If Debtor A immediately files for chapter 13, his CMI on B22C will be $10,000 while his "average monthly income" on schedule I will be $5,000. Should Debtor A's disposable income be calculated using his Current Monthly Income or his projected post-petition income?

These anomalous and inconsistent outcomes have prompted the bankruptcy courts to attempt to craft a more equitable and predictable outcome that is consistent with the statutory language.

***Hardacre* & *Jass*: Projected Disposable Income is Different than Disposable Income**

The first case to address the projected disposable income issue was *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Texas 2006), where the above-the-median debtor proposed a zero return to nonpriority unsecured creditors. The trustee objected because the debtor had taken a double-deduction[17] for mortgage and car payments, which resulted in no disposable income on B22C. In *dicta,* the court reviewed the background of the means test of §707(b)(2) and noted the issue between projected disposable income and disposable income:

> Section 1325(b)(1)(B)'s use of the phrase "projected disposable income" raises the question of whether the calculation of disposable income for plan purposes should be based upon the debtor's average income for the six months prior to bankruptcy, or the debtor's projected income based upon her financial circumstances on the "effective date of the plan."

The court went on to discuss the potential for anomalous outcomes if a debtor's CMI was substantially higher or lower than the income on the petition date, as listed on schedule I:

> The court believes that the term "projected disposable income" must be based upon the debtor's anticipated income during the term of the plan, not merely an average of her pre-petition income. This conclusion is buttressed not only by the anomalous results that could occur by strictly adhering to §101(10A)'s definition

[17] Under an "aggressive" interpretation of §707(b)(2), the debtor may deduct *both* the IRS allowance and the actual expenses for mortgage and secured car payments; a moderate interpretation is that the debtor can deduct *the greater of* the IRS allowance or the actual expense; and a conservative interpretation is that the debtor can only deduct *the lesser of* the IRS allowance or the actual expense. Most cases currently allow above-the-median debtors to deduct the greater of their actual or IRS expenses.

> of "CMI," but because, taken as a whole, §1325(b)(1) commands such a construction.

Id. at 722.

Hardacre noted that because §1325(b)(1)(B) used the phrase "projected disposable income" and §1325(b)(2) used the phrase "disposable income," Congress must have intended these phrases to mean different things.[18] *Id*. at 723. Furthermore, §1325(b)(1)(B) speaks of projected disposable income "to be received in the applicable commitment period;" and this "suggests that Congress intended to refer to the income actually to be received by the debtor during the commitment period, rather than pre-petition average income." *Id*. Finally, §1325(b)(1) requires that the debtor must commit all projected disposable income "as of the effective date of the plan" which also "suggests that the debtor's income 'as of the effective date of the plan' is the one that is relevant to the calculation of 'projected disposable income,' not her income prior to filing." *Id*. Ultimately, *Hardacre* denied confirmation finding that the debtor could not take the double-deduction but only "the greater of her actual mortgage and car ownership payments or the amounts provided in the [IRS] Local Standards." *Id.* at 727.

While *Hardacre's* comments on projected disposable income were *dicta*, a number of courts adopted the reasoning that the only way to avoid anomalous results was to determine disposable income by comparing B22C and schedules I & J and selecting the method that most accurately reflected the debtor's post-petition ability to pay unsecured creditors.

The case of *In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006), followed *Hardacre* and addressed the issue of what happens if the debtor's financial situation worsens in proximity to the bankruptcy filing such that Form B22C shows more disposable income than schedule J. During the six months prior to the bankruptcy filing, Mr. Jass had been working in New Orleans on the Hurricane Katrina clean-up and had earned more than his normal income. Consequently, the debtors' Form B22C showed average monthly income of $11,950.33 (well above the state's median income) and monthly disposable income of $3,625.63. Approximately one month after the bankruptcy filing, Mr. Jass completed the job in New Orleans, which substantially reduced his income. In addition, Mr. Jass also incurred significant post-petition medical expenses.

The debtors amended their schedules I & J, which then showed gross monthly income of only $7,987 and monthly net income of $650, and they amended their plan to return a total return of only $790 to unsecured creditors. The trustee objected to confirmation on the grounds that B22C showed "monthly disposable income" of $3,625.63, and §1325(b)(1)(B) required the debtors to return $217,537.80 ($3,625.63 x 60) to unsecured creditors.

In light of the post-petition diminishment of their financial situation, the debtors argued "that the changes under BAPCPA do not require them to pay unsecured creditors the amount resulting from their B22C, so long as they can show that the income and expenses reported on the Form are inadequate representations of their future budget." *Id.* at 414.

The court agreed and held that the disposable income from Form B22C was only the starting point for its inquiry as to whether the debtors satisfied the disposable income test of §1325(b).

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[18] Those who have daily worked with the conflicting, confusing and inartful provisions of BAPCPA, and who are familiar with the politics of its passage, express doubt that Congress intended or was even sentient of a difference between "disposable income" and "projected disposable income."

The court noted that the term “projected” modifies “disposable income,” such that “disposable income” relates to a debtor’s historical finances while “projected disposable income” relates to a debtor’s future finances: “To require all debtors to propose plans paying the number resulting from Form B22C would essentially ignore the word “projected” and give meaning only to the term “disposable income.” *Id.* at 416. Consequently, *Jass* held: “Under the clear meaning of the statute, a debtor must propose to pay unsecured creditors the number resulting from Form B22C, unless the debtor can show that this number does not adequately represent the debtor’s budget projected into the future.” *Id.* at 416.

Judge Thurman went on to state additional support for his holding based on the following factors. First, in the absence of a meaningful Congressional record, the court could consider pre-BAPCPA construction of §1325(b) in determining Congressional intent. In making such a review, the court found that while BAPCPA modified the definition of disposable income, it did not remove “projected” from §1325(b)(1), and it did not add “projected” to §1325(b)(2): “The court can only conclude that the available evidence of Congressional intent underlying §1325(b) bolsters its holding that the number resulting from Form B22C is not always a debtor’s ‘projected disposable income.’” *Id.* at 417.

Next, *Jass* held that an interpretation of projected disposable income should be consistent with the “overarching policy of the Bankruptcy Code to afford a debtor a ‘fresh start.’” *Id.* at 417. The court felt that if a debtor was straight-jacketed with the disposable income calculation of B22C, when such was patently inconsistent with the debtor’s financial reality, it “would essentially foreclose the potential for bankruptcy relief from a group of chapter 13 debtors who are otherwise eligible for relief.” *Id*. In other words, the court would not compel debtors to pay more into their plan than was possible under their current financial situation, as evidenced by schedules I & J.

Finally, *Jass* found that it should avoid interpretations that render statutory language superfluous; therefore, projected disposable income and disposable income should be viewed as different concepts.

By finding that B22C creates a presumption rather than a conclusive finding of a debtor’s disposable income, *Jass* created a way to relieve debtors from the potentially onerous results of B22C when their financial situation has deteriorated just before or after the bankruptcy filing. However, *Jass* begs the question as to whether the presumption of B22C can be challenged offensively by a trustee or unsecured creditors if the debtor’s financial fortunes improved just prior to the bankruptcy filing, and schedules I & J show more disposable income than B22C. Since *Jass* holds that Form B22C is the starting point for the court’s inquiry of the disposable income test, the answer would seem to be in the affirmative.

Other Decisions: Just such a situation arose in *In re Kibbe*, 342 B.R. 411 (Bankr. D.N.H.), where the debtor obtained a new job shortly before filing for bankruptcy such that her Form B22C showed CMI of $1,068.50 (which was below the state’s median) while schedule I showed gross income of $5,027. If disposable income was calculated using the debtor’s CMI on B22C, it resulted in a negative number; however, if disposable income was calculated using the income on schedule I, it resulted in a positive $2,382 per month. The debtor argued that §1325(b)(2) requires disposable income to be calculated using B22C, but the court rejected that argument based on the difference between disposable income and projected disposable income: “In a below median case, ‘projected disposable income,’ as used in §1325(b)(1)(B), is based on a debtor’s current income and expenses as reflected on schedules I and J.” *Id.* at 415. To hold otherwise, the court said, would allow the debtor to “avoid paying any money to unsecured creditors despite having the ability to do so.” *Id.*

Taking a different approach, *In re Barr*, 2006 341 B.R. 181 (Bankr. M.D.N.C.), considered the role of good faith when comparing a debtor’s excess income on B22C versus schedules I & J. In *Barr*, the above-the-median debtor proposed a zero percent plan because B22C showed no disposable income; however, schedules I and J showed $513 in excess income. This was not due to a change in the debtor’s financial situation, but simply the difference between how B22C and schedules I & J calculated excess income. The trustee objected to confirmation on the grounds of bad faith, but the court confirmed the plan finding that with the enactment BAPCPA, Congress replaced good faith with the means test of Form B22C: “Congress has created a set of rules which – as here – a debtor may be left with uncommitted income that the debtor is not required to commit to the debtor’s plan under the new section 1325(b) analysis.” *Id.* at 185. Curiously, the court did not address the *Hardacre* or *Jass* holdings.

The case of *In re Schanuth*, 342 B.R. 601 (Bankr. W.D.Mo.), looked at the issue when the difference between B22C and schedules I & J is due to Social Security income. In this case, the below-the-median debtors received $819 in monthly Social Security benefits. As a result, Form B22C[19] showed disposable income of a negative $639 while schedules I & J showed disposable income of a positive $292. In a variation on the disposable income calculation, the *Schanuth* court took the debtors’ CMI from B22C (which excluded the Social Security income) and subtracted the expenses on schedule J to arrive at a disposable income of $23. Because the debtors’ proposed plan payment was $300, the court found that the plan was not feasible but suggested that the debtors might solve this problem if they “voluntarily” included their Social Security income in their disposable income calculation and paid the resulting $292 into the plan for three years. *Id.* at 605-06.

Further complicating the issue is the case of *In re McGuire*, 342 B.R. 608 (Bankr. W.D. Mo.) where the above-the-median debtors also had Social Security income. Their B22C showed monthly disposable income of $178 but schedules I & J showed disposable income of $1,292. The debtors proposed to pay $600 a month to return $10,860 to unsecured creditors, which was the amount of their disposable income from B22C ($178) times the applicable commitment period of 60 months. Based on this proposal, the debtors would complete their plan in much less than 60 months, and the trustee objected. The court sustained the objection finding that it would not confirm the plan unless it ran a full 60 months, presumably even if this meant the debtors would pay more than the $10,860 to unsecured creditors.

In the case of *In re Fuller*, 2006 WL 2096484 (Bankr. S.D. Ill. 2006), the court applied a “hybrid” approach in determining projected disposable income. The court held that “’projected disposable income’ means something more than the number on line 58 of Form B22C...” and that meaning is the same whether a debtor is above or below the median. Consequently, for all debtors, income is calculated on schedule I as of the petition date, and “parties should look to Form B22C to determine which expenses to deduct – reasonable schedule J expenses for below-median debtors, standardized expenses for above-median debtors. In other words, the court held

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[19] The debtors in *Schanuth* were below the state’s median income, so it is unclear why they completed the remainder of Form B22C.

that “parties in all cases must use Form B22C and schedule I to calculate ‘projected disposable income.’”

Another hybrid variation of the disposable income calculation is found in *In re Nevitt,* 2006 WL 2433491 (Bankr. N.D. Ill. 2006), where the below-the-median debtors argued that it was unfair to calculate their projected disposable income using schedules I & J because if they were above-the-median they take the greater deductions allowed by Form B22C and pay less to unsecured creditors.[20] The court held that the Code clearly limits B22C deductions to above-the-median debtors and that the appropriate approach for below-the-median debtors is to deduct court-allowed expenses on schedule J and then deduct the plan payments on administrative and secured claims to arrive at the projected disposable income to be paid to unsecured creditors. The court found this result to be fair because below-the-median debtors only have a three-year applicable commitment period.[21] Accord, *In re Quarterman*, 342 B.R. 647 (Bankr. M.D. Fla. 3/28/2006) (for below-the-median debtor, “amounts reasonably necessary to be expended” are calculated by deducting allowed expenses on schedule J *and* the monthly payment on secured debt under the plan.).

Other cases that have followed *Hardacre* and *Jass* include the following: *In re Demonica*, 345 B.R. 895 (Bankr. N.D. Ill. 2006) (projected disposable income must mean something different than “disposable income” and projected disposable income to be paid to unsecured creditors is reflected on Schedule I rather than the historical average on B22C); and *In re Risher*, 344 B.R. 833 (Bankr. W.D. Ky. 2006) (“The numbers resulting from the calculations on Form B22C represent a starting point for the court’s inquiry. It represents a floor, not a ceiling.”).

Criticisms of *Hardacre* and *Jass*

Hardacre and *Jass* have not been without their critics, who believe the holdings circumvent the intended rigid structure of the Means test and are inconsistent with the “plain meaning” of the Code.

Contrary Decisions. In *In re Alexader,* 344 B.R. 742 (Bankr. 2006), the court conducted a consolidated hearing in 25 cases on the meaning of projected disposable income and the applicable commitment period and invited trustees and debtors’ and creditors’ attorneys to participate. In rejecting *Hardacre* and *Jass*, the court suggested that they placed too much emphasis on prior law and not enough on the “existing statutory text.” *Id.* at 747. As a result, the court applied an amazingly simple approach to calculating projected disposable income – “one simply takes the calculation mandated by §1325(b)(2) and does the math.” *Id.* at 749. In other words, if Line 58 on Form B22C results a sum of zero or less, the debtor has no disposable income and does not need to make any payments to unsecured creditors: “To veterans of chapter 13 practice, it runs afoul of basic principles to suggest that a debtor with no disposable income can nonetheless propose a confirmable plan. Yet BAPCPA permits precisely that.” *Id.* at 750.

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[20] See the example given above of how a debtor who makes less may be required to pay more.

[21] As demonstrated in the example, the application of the applicable commitment period does not necessarily mitigate the inequity of BAPCPA’s bifurcated disposable income calculation.

In *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wis. 2006), the court noted the counterintuitive result of limiting disposable income for above-the-median debtors to the calculation of Form B22C, but that BAPCPA compelled such a result:

> Although contrary to the stated purpose of BAPCPA and seemingly discriminatory against chapter 13 debtors with incomes below the median, the unambiguous language of the new statute compels but one answer: the above-median debtor's expense deductions are governed by Form B22C, not by Schedule J. If the above-median debtor's Form B22C contains enough deductions, the debtor will be entitled to obtain confirmation of a plan paying nothing to the unsecured creditors, even though the debtor's budget shows that excess funds are available.

Id. at 642.

Congress Ostensibly Thought Projected Disposable Income Was Defined By §1325(b)(2). Perhaps the strongest argument against finding that "projected disposable income" is different than "disposable income" is that for purposes of an individual's chapter 11 case, Congress defined these terms to have the same meaning. In the confirmation requirements of a chapter 11 plan filed by an individual, BAPCPA added a confirmation requirement to §1129 that is similar to §1325(b). Specifically, if the chapter 11 debtor proposes less than a 100 percent plan, and an unsecured creditor objects, then the chapter 11 plan can only be confirmed if:

> [T]he value of property to be distributed under the plan is not less than the *projected disposable income* of the debtor (*as defined in section §1325(b)(2)*) to be received during the 5-year period" of the plan.

11 U.S.C. §1129(a)(15)(B) (emphasis added).

However, §1325(b)(2), only contains a definition for the phrase "disposable income." Based on this fact, it can be argued that "projected disposable income" is defined by the "disposable income" definition of §1325(b)(2), and thus they are the same concept.

Did Congress Intend For Projected Disposable Income To Be Based On Historical Figures? Is it possible that Congress may have evidenced some wisdom in tying disposable income to historical revenue? Take for example the facts in *Jass* where for the six months prior to the bankruptcy filing, the debtor made approximately $4,000 more per month than his usual salary. This situation raises the question as to why the debtor had to file for bankruptcy relief right after a period of financial prosperity (*e.g.*, why did the debtor not use the extra income to pay creditors and avoid the bankruptcy filing altogether?). Could Congress have intended that when a debtor seeks to file for bankruptcy within a six-month period of relative financial prosperity that the historical calculations of CMI and disposable income under B22C will "encourage" the debtor to delay the bankruptcy filing for a period of at least six months? Possibly.

On the flip side, consider the facts of *Kibbe* where the debtor had six months of low income and then obtained a good-paying job. Six months of financial difficulty is usually sufficient time for a debtor to experience real financial trouble, including the threatened repossession of a vehicle or foreclosure on a home. Could Congress have deemed such debtors worthy of chapter 13 relief even though they would pay a lesser amount to unsecured creditors? Could the intent be to give such debtors sufficient excess income to fully cure any default on a home or vehicle and to minimize the risk of any default under the plan? Does this presume too much for Congressional munificence? Perhaps.

The Word "Projected" Does Not Modify The Meaning Of "Disposable Income." Critics assert that the courts gave meaning to the word "projected" by wholly ignoring the defined term of "disposable income." The *Jass* court held that "By placing the word 'projected' next to 'disposable income' in §1325(b)(1)(B), Congress modified the import of 'disposable income.'" *Id*. at 415-16.

However, critics point out that the word "projected" is not an adjective that modifies the noun "disposable income" but it is a transitive verb, meaning that it shows action taken as to the direct object of "disposable income."[22] Therefore, one could argue that "projected" does not modify the meaning of "disposable income" but instead only communicates that the debtor took some prior action to arrive at the amount of disposable income, such as performing the calculation in B22C. Under this interpretation, §1325(b)(1)(B) could be rephrased as follows: "the plan provides that all of the debtor's disposable income, <u>*as projected by Form B22C*</u>, to be received in the applicable commitment period … will be applied to make payments to unsecured creditors under the plan."

Another interpretation is found from the tertiary definition of "projected" which is "to put or set forth **:** present for consideration." *Id*. From this, it can be argued that "projected disposable income" is the amount the debtor has "presented for consideration" to the court and creditors to be paid through the plan pursuant to B22C.

Conclusion

Rather than bringing uniformity, predictability and fairness to the determination of what a debtor must pay into a chapter 13 plan, BAPCPA has considerably confused and confounded the issue. Courts have attempted to do equity by basing "projected disposable income" on what a debtor can actually pay at or near the time of the bankruptcy filing rather than on the historical and somewhat artificial calculation of Form B22C. With BAPCPA decisions yet to work their way through the appellate process, only time will time if this approach is deemed consistent with Congressional intent and the "plain meaning" of the statute. In the interim, it seems that in advising above-the-median debtors about what to return to unsecured creditors, counsel should carefully consider the projected disposable income on schedules I & J when it is different from the disposable income listed on Form B22C. Counsel should also consider what role the Applicable Commitment Period may play in the return to unsecured creditors when the plan of an above-the-median debtor runs less than 60 months.

Finally, those with influence over the implementation of BAPCPA may wish to consider interpretations, forms, and amendments that will minimize, if not eliminate, the patently unfair outcome of below-the-median debtors being required to pay more to unsecured creditors than above-the-median debtors who are similarly situated.

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[22] *Merriam-Webster's Collegiate Dictionary*, Eleventh Edition.