

Recap of Projected Disposable Income in Chapter 13 Cases – 6th Circuit

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Prior to enactment of the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (“BAPCPA”) Chapter 13 plan payments were typically calculated by projecting the difference between the amounts provided on debtor’s filed Schedules I and J which listed the debtors income and expenses respectively. With the passage of BAPCPA, Congress provided the bankruptcy code with a new sense and direction on how we analyze bankruptcy and determine a debtor’s ability to pay on his or her debts. This guidance was further refined as to how to determine the Chapter 13 plan payments with the introduction of new terminology and definitions.

For a case to be confirmed over objection of the trustee or allowed unsecured creditor, the plan per BAPCPA must provide that “all of the debtor’s projected disposable income to be received in the applicable commitment period beginning on the date the first payment is due under the plan will be applied to make payment to unsecured creditors under the plan.”ⁱ With that provision, new terminology and definitions were presented in determining the debtor’s projected disposable income. The terms “disposable income,” “current monthly income,” “applicable commitment period,” and “median income” were introduced and are defined as follows:

Disposable income is defined as current monthly income received by the debtor, other than child support payments, foster care payments, or disability payments for a dependent child..., less amounts reasonably expended for the maintenance and support of the debtor or a dependent of the debtor.ⁱⁱ

Current monthly income (“CMI”) is defined as the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive)... during the six month period... immediately preceding the commencement of the case and does not include any benefits under the Social Security Act.ⁱⁱⁱ

Applicable commitment period (“ACP”) is defined as three years or if the debtor’s combined household income multiplied by twelve is greater than the median family income for that household size, then the ACP is not less than five years.^{iv}

Median family income is defined as a number that is “both calculated and reported by the Bureau of the Census in the then most recent year.”^v

Amounts reasonably necessary to be expended is defined for a debtor under the median income as the amount needed for the maintenance and support of the debtor or the debtor’s dependents.^{vi}

For over median debtors it is the amounts specified in §§ 707(b)(2), 1325(b)(3)(A) or Official Form 122C-1, also referred to the “Means Test.”

Once “disposable income” is calculated it is “projected” in a Chapter 13 case to determine the amounts to be paid to unsecured creditors. The challenges that followed were that “projected disposable income” was not specifically defined in the amendments. After BAPCPA, many courts considered what “projected disposable income” actually meant with mixed results. Specifically, courts struggled with how to deal with cases where a debtor’s CMI and resulting disposable income resulted in a different number than what the calculations reflected on the debtor’s Schedules I and J. The courts adopted two main approaches to determine projected disposable income: the “mechanical approach” and the “forward-looking approach.”

The “mechanical approach” of determining projected disposable income took disposable income, as calculated on Form 122A-1, and multiplied that number by the number of months in the commitment period.^{vii} The resulting number from that calculation was the amount to be paid to the debtor’s unsecured creditors. This was true even if the resulting number on the debtor’s Schedules I and J on the date of filing was a different number. This analysis was strictly reliant upon the historical calculation of the debtor’s CMI and did not take into account any foreseeable changes in a debtor’s income or expenses. This approach somewhat unfairly favored debtors whose historical income was less than what was stated on the date of filing and could greatly reduce what was required to be paid.

The “forward-looking approach” started with the debtor’s disposable income as determined by the mechanical approach but was not as rigid and provided considerations for the debtor’s actual income and expenses shown on the Schedules I and J on the date of filing. This was the holding in the Supreme Court case of *Hamilton v. Lanning*, 130 S. Ct. 2464, 2478 (2010) which stated that because Congress did not define the term “projected disposable income,” that pre-BAPCPA practices still applied, and “that courts may take into account known or virtually certain changes to debtors’ income or expenses when projecting disposable income.”

The Supreme Court decision in *Lanning* thus held that projected disposable income was the debtor’s CMI minus “amounts reasonably necessary to be expended” and the remaining funds left over multiplied by the ACP.^{viii} However, if there are any substantial changes in the debtor’s income and expenses that are reasonably foreseeable as of the effective date of the plan, those changes can be taken into consideration in determining that projected disposable income.^{ix}

On February 16, 2022, the Labor Department released that the consumer price index, or inflation, climbed 7.5% from January 2021 to January 2022, which is the largest 12-month increase since February 1982 and a 39 year high.^x Further, according to the U.S. Energy Department, gas prices are at their highest since October 2014 and have increased an average of 98 cents a gallon from a year ago, which is a 12-month increase of 46.5%.^{xi} Since Chapter 13 projected disposable income is forward looking, and current news is that living expenses are increasing; we should expect to see these increases reflected on a debtor's Schedule J. By following the logic in *Lanning*, a debtor's projected Schedule J expenses showing an increase of 7.5% over the national and local standards should not be surprising and should be given deference as being reasonable.

Another issue presented to the bankruptcy courts after the *Lanning* decision, was whether the ACP was a temporal requirement, meaning the plan had to last three or five years, or if it was merely a multiplier of disposable income to determine the entire amount required to be paid into the plan. For Sixth Circuit cases this issue was decided in the case of *Baud v. Carol*, 634 F. 3d 327(6th Cir. 2011), cert. den., 132 S. Ct. 997 (U.S. Sup. Ct. 2012). In this important case the Sixth Circuit joined the Eighth, Ninth & Eleventh Circuits in determining the ACP, as provided by 11 U.S.C. §1325(b)(1)(B), to be a temporal requirement.^{xii} The court clarified that the temporal requirement for under median income debtors who are proposing to pay less than 100% to unsecured claims must provide for a plan length not less than 36 months, and over median income debtors proposing to pay less than 100% to unsecured, plan length must not be less than 60 months.^{xiii} The court found this is still true for over median debtors even if the means test shows the debtor has a negative or zero disposable income.^{xiv}

The 6th Circuit Court not only recognized the Supreme Court's *Lanning's* forward-looking approach in determining projected disposable income but also recognized there were some provisions of the code that could not be ignored in determining disposable income. It went on to say that any discretion afforded in the *Lanning* case "does not permit bankruptcy court to alter BAPCPA's forms for calculating disposable income."^{xv} Holding that the calculation of a debtor's projected disposable income "must exclude income- such as benefits received under the Social Security Act – that are excluded from the definition of current monthly income set forth in §101(10A) and must deduct 'amounts reasonably necessary to be expended' as defined in 1325(b)(3)..."^{xvi} It reasoned that although in pre-BAPCPA projected disposable income calculations usually included Social Security benefits when calculating a debtor's disposable income, it recognized with BAPCPA a clear indication was made as to Congress's intent to discontinue that practice by specifically defining CMI.^{xvii} BAPCPA's

provision to exclude Social Security benefits for payment on debt is further supported by another federal law, 42 U.S.C. § 407 (a) & (b) of the Social Security Act, which provides:

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.^{xviii}

The Sixth Circuit did not specifically discuss whether excluding Social Security income would go astray of a good faith analysis, but by its discussion on the importance of the Code omitting specified income in the definition of CMI, it would seem excluding Social Security benefits would not. Other cases that have decided that omitting Social Security benefits cannot be considered in a good faith analysis are *Drummond v. Welsh (In re Welsh)*, 711 F. 3d 1120 (9th Cir. 2013) *aff'g Drummond v. Welsh (In re Welsh)*, 465 843 (B.A.P. 9th Cir. 2012), *Anderson v. Cranmer (In re Cranmer)*, 697 F. 3d 1314, 1319 (10th Cir. 2011), *Beaulieu v. Ragos (In re Ragos)*, 700 F. 3d 220, 227 (5th Cir 2012), *Fink v. Thompson*, 439 B.R. 140 (8th Cir. BAP 2010). Although the courts above have found that Social Security benefits are not required to be included in a Chapter 13 debtor's projected disposable income, it is widely accepted that a debtor is not precluded from voluntarily providing a portion or all for payment to show feasibility of the case.^{xix}

After BAPCPA Congress has since passed another law to provide further guidance as to what income should not be included in CMI by enacting the Honoring American Veterans in Extreme Need Act of 2019, also known as the HAVEN Act. The passing of the law amended 11 U.S.C. § 101(10)(A) to exclude benefits received by the Department of Veteran's Affairs ("VA") in CMI to mirror the same protections already afforded Social Security benefits.^{xx} Prior to the Act being signed into law, these benefits were included in debtor's CMI and debtor's projected disposable income. Although case law is somewhat limited due to the newness of the law, because the provisions of the HAVEN Act mirror that of Social Security benefits, it would seem the courts would follow the decisions already determined in regards to Social Security.

A case in point was recently decided in the Eastern District of Michigan, *In re Gresham*, 616 B.R. 505 (Bankr. E.D. Mich. 2020). In this case the debtor argued her VA disability benefits could be

excluded from her CMI and was not part of her projected disposable income for purposes of 11 U.S.C. §1325(b) and therefore did not need to be contributed to her Chapter 13 plan. The Court held that the debtor may rightfully exclude Veterans Disability Income from her projected disposable income and also found the HAVEN Act could be applied retroactively in Chapter 13 cases pending and already confirmed.^{xxi}

Chapter 13 is a vehicle for debtors to be able to pay on their debts but still maintain a reasonable living. What we have learned from *Lanning* is that projecting a debtor's disposable income is done by calculating the debtor's CMI, as defined, subtracting the amounts reasonably necessary to be expended, multiplying the resulting figure by the ACP, and then taking into account all known or virtually certain changes at that time of confirmation. In *Baud* we learned that the ACP is a temporal requirement and if a debtor is under median income his plan shall run 36 months, and if a debtor is over median income his plan shall run 60 months. This is true even if his disposable income is zero or negative. Further, disposable income does not include Social Security benefits, and with the most recent passing of the HAVEN Act, does not include VA Disability and thus neither Social Security or VA benefits need to be included in a debtor's projected disposable income.

ⁱ 11 U.S.C. §§ 1325 (b)(1)(A), (b)(1)(B)

ⁱⁱ 11 U.S.C. § 1325(b).

ⁱⁱⁱ 11 U.S.C. §§101(10A).

^{iv} 11 U.S.C. § 1325 (b)(4)

^v 11 U.S.C. §101(39A)(A).

^{vi} 11 U.S.C. 1325 (b)(2)(A)(i)

^{vii} See *In re Barr*, 341 B.R.181 (Bankr. M.D.N.C. 2006); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006) *In re Guzman*, 341 B.R. 640 (Bankr. E.D. Wis. 2006)

^{viii} *Hamilton v. Lanning*, 130 S. Ct. 2464, 2469

^{ix} *Id.*, at 2478.

^x <https://www.bls.gov/opub/ted/2022/consumer-prices-up-7-5-percent-over-year-ended-january-2022.htm>

^{xi} See <https://www.eia.gov/outlooks/steo/marketreview/crude.php> , <https://www.eia.gov/petroleum/gasdiesel/> , and <https://www.bls.gov/opub/ted/2022/consumer-prices-up-7-5-percent-over-year-ended-january-2022.htm>

^{xii} *Baud v. Carol*, 634 F. 3d 327(6th Cir. 2011), *cert. den.*, 132 S. Ct. 997 (U.S. Sup. Ct. 2012)

^{xiii} 11 U.S.C. §1325(b)(4)

^{xiv} *Baud*, at 356.

^{xv} *Baud*, at 345.

^{xvi} *Id.*, at 357.

^{xvii} *Id.*, at 347.

^{xviii} 42 U.S.C.407

^{xix} See *Mort Ranta v. Gorman*, 721 F. 3d. 241, 250-53 (4th Circuit)

^{xx} See H.R. 2938 *Honoring American Veterans in Extreme Need Act of 2019* also known as the HAVEN Act.

^{xxi} *In re Gresham*, 616 B.R. 505 (Bankr. E.D. Mich. 2020)