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## *Hamilton v. Lanning*: The Economic Implications of Forecasting a Debtor's Disposable Income

IN *HAMILTON V. LANNING*,<sup>1</sup> THE SUPREME COURT of the United States considered whether bankruptcy courts should determine a Chapter 13 debtor's "projected disposable income" according to the mechanical calculation of disposable income under 11 U.S.C. § 1325(b)(2), or whether a future-oriented interpretation would better capture a debtor's ability to fund the repayment plan during its applicable commitment period.<sup>2</sup> The Court adopted a forward-looking approach in holding that there is a presumption that the statutory calculation of disposable income is a debtor's "projected disposable income," except in exceptional cases where significant changes in a debtor's future financial situation are known or virtually certain at the time of the plan's confirmation.<sup>3</sup> In so holding, the Court properly interpreted "projected" in accordance with its plain meaning to reflect a debtor's *actual* ability to repay creditors during the repayment plan.<sup>4</sup> A future-oriented calculation of a debtor's disposable income will assure creditors of anticipated cash flow and instill certainty in the financial markets.<sup>5</sup> Moreover, plan modification after confirmation under 11 U.S.C. § 1329 should have restricted application to circumstances where a debtor encounters unforeseeable, substantial changes in income, thus hindering his or her ability to fulfill the repayment schedule.<sup>6</sup> Absent extraordinary circumstances, a forward-looking approach minimizes the need for creditors to apply for plan modification for the purposes of harassing debtors for a greater return and exhausting valuable resources over nominal litigation.<sup>7</sup>

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1. 130 S. Ct. 2464 (2010).
2. *Id.* at 2469.
3. *Id.* at 2471.
4. See *infra* Part IV.A.
5. See *infra* Part IV.C.
6. See *infra* Part IV.B.
7. See *infra* Part IV.B.

## I. THE CASE

On October 16, 2006, debtor Stephanie Lanning filed a Chapter 13 bankruptcy petition to address her \$36,793.36 of unsecured debt.<sup>8</sup> During the six months prior to her filing, she received a buyout from her employer at the time.<sup>9</sup> Consequently, she earned an income above the median in her home state of Kansas.<sup>10</sup> The debtor calculated a monthly disposable income of \$1,114.98 under 11 U.S.C. § 1325(b)(2).<sup>11</sup>

Since the six-month looking-back period<sup>12</sup> when the debtor's disposable income was calculated based on her inflated earnings prior to filing for bankruptcy, the debtor's income dropped below the state median and her monthly disposable income fell to \$149.03.<sup>13</sup> Subsequently, the debtor proposed a plan to pay her creditors \$144.00 per month for 36 months.<sup>14</sup> Hamilton, the Chapter 13 Trustee, acknowledged the debtor's depressed financial situation since her initial disposable income was calculated under § 1325(b)(2).<sup>15</sup> Nevertheless, he filed an objection to the plan's confirmation based on the debtor's failure to commit all "projected disposable income" to the plan based on her earlier determination of monthly disposable income of \$1,114.98.<sup>16</sup> The Trustee contended that under § 1325(b)(1)(B), a debtor's "projected disposable income" to be committed to repay unsecured creditors should be derived from the mechanical formula for disposable income under § 1325(b)(2).<sup>17</sup>

The United States Bankruptcy Court for the District of Kansas interpreted "projected disposable income" under § 1325(b)(1)(B) as a forward-looking concept to encompass a debtor's *actual* income at the plan's confirmation by characterizing

8. *In re Lanning*, 545 F.3d 1269, 1270 (10th Cir. 2008). Chapter 13 bankruptcy enables a debtor to construct a plan of monthly payments to repay creditors.

9. *In re Lanning*, 545 F.3d at 1270–71.

10. *In re Lanning*, 545 F.3d at 1271. Above-median debtors are subject to more rigorous standards than below-median debtors when formulating a Chapter 13 repayment plan: "disposable income" is calculated by subtracting only certain standardized deductions from "current monthly income" and the payment plan's applicable commitment period is five years instead of three, as compared to a debtor whose current monthly income is less than the state median family income. 11 U.S.C. § 1325(b)(3)–(4).

11. *In re Lanning*, 545 F.3d at 1271. Disposable income is calculated by subtracting the debtor's reasonably necessary monthly expenses from current monthly income received by the debtor. 11 U.S.C. § 1325(b)(2).

12. The six-month period before filing is significant because disposable income is based on the average "current monthly income" received by the debtor. 11 U.S.C. § 1325(b)(2). Current monthly income is defined as the average monthly income from all sources that the debtor receives during the six-month period prior to filing. *Id.* § 101(10A)(A).

13. *In re Lanning*, 545 F.3d at 1271.

14. *Id.* See also *id.* at 1271–72 (noting that the debtor's plan proposed to devote monthly payments of an amount less than an amount the Trustee calculated would pay her creditors in full: \$756 per month for sixty months).

15. *Id.* at 1272. A Chapter 13 trustee is assigned to each case and collects payments from the debtor to make distributions to creditors according to the terms of the repayment plan. 11 U.S.C. § 1302(b).

16. *In re Lanning*, 545 F.3d 1269, 1271 (10th Cir. 2008). See 11 U.S.C. § 1325(b)(1)(B) (requiring that all of a debtor's projected disposable income be applied to repay unsecured creditors through the Chapter 13 plan).

17. *In re Lanning*, 545 F.3d at 1271–72.

the rigid calculation of “disposable income” under § 1325(b)(2) as a presumption that can be rebutted by evidence of substantial changes in income that will impact the debtor’s forecasted budget during the life of the plan.<sup>18</sup> The court reasoned that a forward-looking approach was necessary to avoid “absurd results” when a debtor’s financial circumstance materially changes after the debtor’s disposable income is calculated based on the six-month looking-back period prior to filing.<sup>19</sup> Moreover, the term “projected” describes a forward-looking estimation of a debtor’s actual income “as of the effective date of the plan” to capture the debtor’s ability to realistically satisfy the proposed plan payments.<sup>20</sup>

The Bankruptcy Appellate Panel for the Tenth Circuit of the United States Court of Appeals affirmed the bankruptcy court’s decision that “projected disposable income” may require consideration beyond a strict calculation of disposable income in order to accurately forecast a debtor’s ability to fund the plan.<sup>21</sup>

The United States Court of Appeals for the Tenth Circuit affirmed the Bankruptcy Appellate Panel’s judgment.<sup>22</sup> The court held that the mechanical test for disposable income under § 1325(b)(2) is a presumption which can be rebutted by evidence of an anticipated substantial change in the debtor’s financial situation after the commencement of the plan.<sup>23</sup>

The Supreme Court of the United States granted certiorari to determine whether the “mechanical approach” should be adopted to calculate a debtor’s “projected disposable income,” or whether “projected disposable income” is a forward-looking concept that should account for future circumstances affecting a debtor’s financial means to repay creditors according to the plan’s terms.<sup>24</sup>

## II. LEGAL BACKGROUND

Bankruptcy laws govern the debtor-creditor payment process once individuals or businesses file for bankruptcy.<sup>25</sup> The Bankruptcy Code is divided into Chapters 7, 9,

18. *See id.* at 1273 (confirming the debtor’s payment plan so long as the payments continue for an additional sixty months).

19. *See id.* (describing “absurd results” from the mechanical approach to be either when a debtor cannot financially commit to the plan because of a recent financial hardship or when a debtor has the means to make greater plan payments due to an inflated income since the six-month looking-back period).

20. *Id.*; *accord In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006).

21. *In re Lanning*, 380 B.R. 17, 24–25 (B.A.P. 10th Cir. 2007).

22. *In re Lanning*, 545 F.3d 1269, 1282 (10th Cir. 2008).

23. *See id.* at 1278, 1282 (identifying “disposable income” under § 1325(b)(2) as a starting point that can be altered to reflect a substantial change in the debtor’s income).

24. *Hamilton v. Lanning*, 130 S. Ct. 2464, 2469 (2010). The “mechanical approach” used to determine a debtor’s “projected disposable income” is derived from the calculation of “disposable income” under § 1325(b)(2). *Id.*

25. *See* JAMES C. DUFF, *BANKRUPTCY BASICS*, ADMIN. OFFICE OF THE U.S. COURTS, at 5–6 (3d ed. 2010), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/FederalCourts/BankruptcyResources/bankbasics.pdf> (describing how the Bankruptcy Code, codified at Title 11 of the United States Code, governs bankruptcy cases).

11, 12, and 13 to address different types of entities with varying degrees of insolvency.<sup>26</sup>

Prior to 1978, consumers and businesses confronted with an inability to fulfill their debt obligations traditionally filed for Chapter 7 liquidations.<sup>27</sup> A Chapter 7 trustee sells a debtor's assets and distributes the proceeds among the creditors.<sup>28</sup> A debtor is relieved of any remaining debt obligations through bankruptcy discharge.<sup>29</sup> Chapter 7 bankruptcy enables a debtor to experience a "fresh start" free of pre-existing debt while enabling creditors to move forward and write off their losses.<sup>30</sup>

In 1978, Congress created Chapter 13 to give debtors an appealing repayment alternative to Chapter 7 liquidations.<sup>31</sup> Chapter 13 bankruptcy, often referred to as a "Wage Earners' Plan," enables income-earning debtors to keep their assets provided that the debtor implements a repayment plan for creditors.<sup>32</sup> Once an individual files for Chapter 13, the automatic stay provision under § 362 prohibits creditors from seeking further collection of the debtor's property, and foreclosure proceedings are halted.<sup>33</sup> Ideally, Chapter 13 bankruptcies promise higher returns for creditors while encouraging debtors to make honest repayment efforts.<sup>34</sup>

*A. Chapter 13 Bankruptcy is a Win-Win for Debtors and Creditors: Debtors Make Honest Efforts to Repay Creditors the Maximum Amount within their Means*

By the early 2000s, 70% of the bankruptcy filers were liquidating under Chapter 7 to curb repayment to creditors under Chapter 13.<sup>35</sup> The credit industry lobbied for more stringent bankruptcy regulations to prevent such abuses in the system.<sup>36</sup> In 2005, Congress responded by enacting the Bankruptcy Abuse Prevention and

26. Compare 11 U.S.C. § 109(e) (limiting Chapter 13 eligibility to individuals and small businesses earning a regular income and owing noncontingent, liquidated, unsecured debts of less than \$250,000 and noncontingent, liquidated, secured debts of less than \$750,000, on the date of the filing of the petition), and § 109(f) (confining Chapter 12 relief to family farmers and family fishermen earning a regular annual income), with § 109(c) (limiting Chapter 9 relief to insolvent municipalities), and §§ 721–28 (liquidating non-exempt assets and discharging debts for exempt assets under Chapter 7), and §§ 1101–74 (enabling corporations to formulate reorganization plans in Chapter 11 bankruptcy).

27. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS* 141 (Vicki Been & Erwin Chemerinsky eds., Aspen Publishers 6th ed. 2009).

28. See *id.* at 115, 141 (discussing how liquidation consists of stripping a debtor of his or her non-exempt assets, which typically results in low recovery for the creditor in "no asset" cases).

29. Bankruptcy discharge releases the debtor from personal liability of certain debts that they are no longer legally bound to pay. *Id.* at 115, 141–42.

30. *Id.* at 142.

31. *Id.* at 143.

32. *Id.* at 115, 275.

33. See 11 U.S.C. § 362 (prohibiting creditors from any act to collect or recover a claim against the debtor that arose before the commencement of the case).

34. See WARREN & WESTBROOK, *supra* note 27, at 115.

35. See *id.* at 149 (noting the high failure rate of debtors fulfilling Chapter 13 repayment plans).

36. See *id.* at 150 (noting that making a more stringent screening process for individuals attempting to file for Chapter 7 liquidation would steer them into Chapter 13's repayment alternative if debtors wanted any bankruptcy relief under the Code).

Consumer Protection Act (“BAPCPA”).<sup>37</sup> To restore fairness to the bankruptcy process, the 2005 Amendments put forth mechanisms to screen eligibility for Chapter 7 and to push consumers toward Chapter 13 for bankruptcy relief.<sup>38</sup>

Prior to the BAPCPA, courts determined debtors’ projected disposable incomes to be devoted to Chapter 13 repayment plans based on a loose calculation of the debtor’s net income less actual expenses.<sup>39</sup> Some judges, however, permitted lower plan repayment amounts for “down-and-out” debtors.<sup>40</sup> The 2005 Act modified § 1325’s plan confirmation process to limit judicial discretion and added an objective “means test” for above-median income earning debtors.<sup>41</sup> Under § 1325(b)(2), “disposable income” was thereafter calculated by subtracting “reasonably necessary expenses,” in accordance with § 707(b)(2)’s means test, from a debtor’s “current monthly income.”<sup>42</sup>

The BAPCPA reforms left “projected disposable income,” which is to be devoted to repaying creditors, undefined under § 1325(b)(1)(B). Bankruptcy courts have since adopted conflicting interpretations of the proper amount to be reserved for plan payments in light of the new definition of “disposable income.”<sup>43</sup> One interpretation suggested that “projected disposable income” should be determined using a “mechanical approach” based strictly on the calculation for “disposable income” under § 1325(b)(2).<sup>44</sup> Another interpretation suggested that a “forward-looking approach” better encompasses the meaning of “projected disposable

37. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong. (2005). *See also* H.R. REP. NO. 109-31, at 2 (2005) (identifying an objective of the BAPCPA in an attempt to resolve the perceived abuse of debtors filing under Chapter 7 when a debtor was eligible for Chapter 13 bankruptcy).

38. *See* WARREN & WESTBROOK, *supra* note 27, at 150–51. The BAPCPA was designed to ensure that debtors repay the maximum amount within their means to creditors under Chapter 13. Chapter 7, however, is still available for those debtors that qualify for liquidation. 151 CONG. REC. S2459, at S2469 (Mar. 10, 2005) (statement of Mr. Grassley).

39. Candice L Marple, “*Projected Disposable Income*” under BAPCPA: *Manipulation of Statutory Text and Congressional Intent to Achieve the Desired Result of Ignoring BAPCPA*, 81 TEMP. L. REV. 1199, 1203–04 (2008). *See also* Ned W. Waxman, “*Projected Disposable Income*”: *Legislative Lunacy and Judicial Gyration*s, 46 HOUS. L. REV. 867, 870–71 (2009) (describing Chapter 13 plan confirmation requirements prior to the 2005 Amendments, which rested on a “best efforts test” of the debtor’s ability to pay his or her projected disposable income to unsecured creditors, pursuant to § 1325(b)(1)).

40. *See* WARREN & WESTBROOK, *supra* note 27, at 308 (introducing the need for the BAPCPA because judges were too lenient on debtors by permitting lower repayment amounts under Chapter 13 plans than some debtors could endure).

41. *See* Waxman, *supra* note 39, at 872 (underscoring the BAPCPA’s new definition of disposable income to incorporate “reasonably necessary expenses,” which are to be determined in accordance with the means test for above-median debtors); *see also* Chelsey W. Tulis, *Get Real: Reframing the Debate Over How to Calculate Projected Disposable Income in § 1325(B)*, 83 AM. BANKR. L.J. 345, 379 (2009) (listing Congress’s three purposes for enacting the means test: “1) increase repayment to unsecured creditors; 2) replace judicial discretion with clear standards; and 3) promote the fair treatment of creditors and debtors”).

42. *See* Tulis, *supra* note 41, at 354 (describing how the means test under § 707(b)(2) is only applicable to above-median debtors who are required to subtract additional § 707(b)(2) expenses from “current monthly income” to calculate “disposable income”).

43. *In re Nowlin*, 576 F.3d 258, 262–63 (5th Cir. 2009). Several courts have similarly struggled over the proper interpretation of “projected disposable income.” *See, e.g., In re Kibbe*, 361 B.R. 302, 308 (B.A.P. 1st Cir. 2007); *In re Hardacre*, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006); *In re Alexander*, 344 B.R. 742, 748 (Bankr. E.D.N.C. 2006).

44. *In re Nowlin*, 576 F.3d at 263.

income” by considering evidence of anticipated substantial changes in the debtor’s finances that will affect the debtor’s ability to fund the Chapter 13 plan.<sup>45</sup>

### 1. *The Mechanical Approach: Commitment to Defined Terms*

Historically, courts determined “projected disposable income” under § 1325(b)(1)(B) based on the calculation of “disposable income” under § 1325(b)(2).<sup>46</sup> A minority of courts have adopted the mechanical approach and have held that “disposable income” and “projected disposable income” must be linked to remain consistent with the plain reading of the statute.<sup>47</sup> To separate those phrases would render the Congressional definition of “disposable income” superfluous.<sup>48</sup>

When challenged with interpreting an undefined statutory term, the sole function of the courts is to enforce statutory language according to its plain meaning.<sup>49</sup> It is beyond the courts’ authority to change Congress’s intentional policy choices.<sup>50</sup> A minority of courts give credence to the BAPCPA and argue that since it does not indicate a new interpretation of “projected disposable income” distinct from its historical determination from § 1325(b)(2)’s calculation of “disposable income,” the mechanical approach should prevail.<sup>51</sup>

The United States Court of Appeals for the Ninth Circuit utilized § 1329 to resolve circumstances where a debtor’s income changed after the plan’s confirmation.<sup>52</sup> Under § 1329, a Chapter 13 trustee, debtor, or creditor may seek plan modification to alter plan payments or the plan’s period to account for any discrepancies in the debtor’s income at any point after plan confirmation.<sup>53</sup> Accordingly, the Ninth Circuit argued that interpreting “projected disposable income” to echo that provision’s purpose is futile.<sup>54</sup>

45. *Id.*

46. See *In re Alexander*, 344 B.R. at 749 (taking note of a Fourth Circuit decision that held that “disposable income” is to be determined according to its “statutory definition” (citing *In re Solomon*, 67 F.3d 1128, 1132 (4th Cir. 1995))).

47. See *In re Kagenveama*, 541 F.3d 868, 872 (9th Cir. 2008) (confirming that deriving “projected disposable income” from “disposable income” is the most natural reading of the statute); accord *In re Nance*, 371 B.R. 358, 365 (Bankr. S.D. Ill. 2007).

48. *In re Alexander*, 344 B.R. at 749.

49. *In re Kagenveama*, 541 F.3d at 872 (citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)).

50. *In re Hanks*, 362 B.R. 494, 502 (Bankr. D. Utah 2007).

51. See, e.g., *In re Kagenveama*, 541 F.3d at 874 (holding that the court is “bound” by the definition of “disposable income” under § 1325(b)(2) since it has historically been held that “projected” only modifies “disposable income” in § 1325(b)(1)(B)); *In re Alexander*, 344 B.R. at 749.

52. *In re Kagenveama*, 541 F.3d at 875. The Ninth Circuit Court of Appeals is the highest federal appellate court that has ruled thus far on this issue in favor of the mechanical approach.

53. Plan modification after confirmation may occur “upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to increase or reduce the amounts of payments[, or to] extend or reduce the time for such payments[.]” 11 U.S.C. § 1329 (a)(1)–(2) (2006).

54. See *In re Kagenveama*, 541 F.3d at 879 (noting how a forward-looking approach of “projected disposable income” mimics plan modification under § 1329 since the provision “specifically allows for periodic adjustments” to a debtor’s disposable income to be devoted to the Chapter 13 repayment plan).

## 2. *The Evolution of the Forward-Looking Approach: Considering a Debtor's Realistic Ability to Fund the Chapter 13 Plan*

In 2006, a bankruptcy court abandoned the mechanical approach and was the first to interpret “projected disposable income” as a forward-looking concept based on a debtor’s anticipated income earned during the Chapter 13 plan.<sup>55</sup> A majority of the courts have since followed this realistic analysis of a debtor’s actual ability to fund the plan by adopting the forward-looking approach to determine a debtor’s “projected disposable income” under § 1325(b)(1)(B).<sup>56</sup>

Courts are permitted to analyze statutory language beyond its plain meaning where the text is ambiguous.<sup>57</sup> A majority of courts distinguish “projected disposable income” from the historical calculation of disposable income by giving weight to the term “projected,” which means “to calculate, estimate or predict (something in the future) based on present data or trends.”<sup>58</sup> By purposely including the term “projected” before “disposable income,” courts argue that Congress must have intended for it to have a future-oriented meaning distinct from “disposable income.”<sup>59</sup>

A forward-looking approach is also supported by an analysis of “projected disposable income” within the broader context of the statute as a whole.<sup>60</sup> Section 1325(b)(1) refers to a debtor’s projected disposable income “to be received in the applicable commitment period” and “as of the effective date of the plan.”<sup>61</sup> These phrases suggest that a feasible Chapter 13 plan will reflect a debtor’s *actual* income at the commencement of the plan (“as of the effective date of plan”), and the debtor

55. See *In re Hardacre*, 388 B.R. 718, 722 (Bankr. N.D. Tex. 2006) (concluding that a future-oriented determination of “projected disposable income” was necessary to avoid potential “anomalous results” that could occur in some cases where a debtor’s financial situation changes during the life of the repayment plan).

56. See, e.g., *In re Nowlin*, 576 F.3d 258, 263 (5th Cir. 2009); *In re Turner*, 574 F.3d 349, 356 (7th Cir. 2009); *In re Pak*, 378 B.R. 257, 267 (B.A.P. 9th Cir. 2007); *In re Kibbe*, 361 B.R. 302, 314 (B.A.P. 1st Cir. 2007); *In re Jass*, 340 B.R. 411, 415 (Bankr. D. Utah 2006).

57. See *In re Pak*, 378 B.R. at 269 (writing for a unanimous Supreme Court, Justice Thomas stated that “[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))).

58. *In re Nowlin*, 576 F.3d at 263 (quoting *In re Jass*, 340 B.R. at 415).

59. See *In re Kibbe*, 342 B.R. 411, 414 (Bankr. D.N.H. 2006) (agreeing with *Hardacre*’s decision that relied on the statutory interpretation of “projected” as a descriptive term); see also *In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006) (noting that courts are to presume that Congress acts intentionally and purposely when it includes particular language in a statute but omits that language in another section of the statute (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994))).

60. See *In re Hardacre*, 338 B.R. at 723 (analyzing “projected disposable income” within the context of the language surrounding § 1325(b)(1)(B)).

61. A repayment plan may not be confirmed unless, “as of the effective date of the plan, [it] 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.” 11 U.S.C. § 1325(b)(1)(B).



will be able to fulfill the plan payments over the duration of the plan's period ("disposable income to be received in the applicable commitment period").<sup>62</sup>

A majority of courts construe "disposable income" as a starting point in determining "projected disposable income."<sup>63</sup> The backward-looking calculation of "disposable income" is a presumption of a debtor's "projected disposable income" that can be rebutted by evidence of circumstances affecting the debtor's future earnings.<sup>64</sup> Section 1325(b)(2)'s definition of "disposable income," modified according to evidence of circumstances that distort this initial calculation, will more accurately depict a debtor's disposable income as of the effective date of the plan.<sup>65</sup>

A majority of courts concede that a mechanical approach is sufficient when a debtor's "disposable income" remains relatively consistent from the six-month period prior to filing bankruptcy from which the debtor's current monthly income is calculated, until the debtor satisfies the final Chapter 13 plan payment.<sup>66</sup> A forward-looking approach, however, is necessary to account for situations where the debtor's income materially changes at any point during that time period.<sup>67</sup> This interpretation of "projected disposable income" reaches a realistic determination of a debtor's financial capability to repay his or her creditors.<sup>68</sup> Therefore, a forward-looking approach best preserves Chapter 13 protection for a debtor whose financial situation deteriorates during the plan period and assures equitable distribution to creditors when a debtor's earnings increase after the six-month looking-back period prior to filing.<sup>69</sup>

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62. A majority of courts have held that "to be received in the applicable commitment period" describes the income a debtor earns in the future. See *In re Clemons*, 404 B.R. 577, 581 (Bankr. N.D. Ga. 2006) (concluding that the phrase "to be received" is superfluous if the disposable income applied to the plan is based on a historical calculation); see also *In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006); *In re Kibbe*, 342 B.R. 411, 415 (Bankr. D.N.H. 2006) (applying *Hardacre's* interpretation of "to be received" as a future-oriented phrase). The phrase "as of the effective date of plan" also signifies a debtor's future income at the commencement of the plan. *In re Upton*, 363 B.R. 528, 534 (Bankr. S.D. Ohio 2007). See *In re Pak*, 378 B.R. 257, 265 (B.A.P. 9th Cir. 2007) (noting that the "effective date of the plan" is the date of plan confirmation, which often occurs months after the petition date; therefore, "projected disposable income" is a determination of future income earned as of plan confirmation when the plan becomes effective and binding).

63. See *In re Pak*, 378 B.R. at 267 (describing the historical calculation of "disposable income" as an "anchor" for determining "projected disposable income," which may be modified according to a presentation of contrary evidence before confirmation of a debtor's plan).

64. *In re Nowlin*, 576 F.3d 258, 266 (5th Cir. 2009).

65. See *In re Pak*, 378 B.R. at 267 (noting that it makes "no sense" to view "disposable income" as a rigid determination of a debtor's "projected disposable income" when evidence of the debtor's true financial situation is inconsistent with the historical calculation of "disposable income").

66. See, e.g., *In re Nowlin*, 576 F.3d at 266 (acknowledging that a mechanical calculation will "usually suffice"); *In re Killough*, 900 F.2d 61, 64 (5th Cir. 1990).

67. *In re Killough*, 900 F.2d at 64. See *In re Nowlin*, 576 F.3d at 264 (considering potential occurrences that would impact a debtor's future finances, such as "a promotion at work, the loss of a job, the acquiring of a second job, or increased medical expenses" (quoting *Coop v. Frederickson*, 545 F.3d 652, 659 (8th Cir. 2008))).

68. See *In re Kibbe*, 361 B.R. 302, 314–15 (B.A.P. 1st Cir. 2007) (taking the analysis a step further by considering the impact on the execution of the repayment plan when a debtor's income decreases or increases during the plan's period).

69. *Id.* at 315.

*B. Section 1329 Plan Modification: A Safety Net to Amend Confirmed Repayment Plans*

Bankruptcy courts have acknowledged the unworkable application of the mechanical approach when a debtor's "disposable income" fails to mirror the debtor's actual financial situation during the plan's applicable commitment period.<sup>70</sup> Section 1329 offers a remedy of post-confirmation plan modification to resolve such discrepancies.<sup>71</sup>

Plan modification under § 1329 authorizes bankruptcy courts to modify repayment plans after confirmation, including increasing or reducing the amount of plan payments, changing the length of the plan, and altering the amount of distribution to creditors.<sup>72</sup> This provision authorizes bankruptcy courts to adjust a debtor's plan payments upward at the request of the creditor or the trustee, or downward at the debtor's request, at any time after the plan's confirmation.<sup>73</sup> However, one may only seek plan modification during the time period after the Chapter 13 plan is confirmed and before the last plan payment is completed.<sup>74</sup> If neither the debtor, the trustee, nor any creditor requests plan modification, the debtor subsequently may keep any surplus of income that creditors neglected to attempt to seize.<sup>75</sup>

Section 1329 was primarily enacted as a vehicle to increase or decrease plan payment amounts to accurately reflect a change in the debtor's income after plan confirmation.<sup>76</sup> This provision served as an adequate tool to ameliorate skewed repayment plans.<sup>77</sup> A minority of courts argue that § 1329 is a sufficient resolution when a debtor's income changes after the plan's confirmation.<sup>78</sup> Nonetheless, courts have encountered challenges in applying § 1329 in the absence of explicit legislative guidance as to the standard for granting a motion to modify a plan.<sup>79</sup>

70. See David Gray Carlson, *Modified Plans of Reorganization and the Basic Chapter 13 Bargain*, 83 AM. BANKR. L.J. 585, 617 (2009). A debtor's historic calculation of "current monthly income" is subject to change after plan confirmation due to a debtor's unique financial circumstances. *Id.* See also *In re Pak*, 378 B.R. at 267 (cautioning that deriving "projected disposable income" from the statutory calculation of "disposable income" may be affected by contrary evidence proving that the mechanical figure is skewed); *In re Kibbe*, 361 B.R. at 314 (noting that a rigid approach to a determination of projected disposable income can later produce results at odds with common sense when a debtor's income changes after the plan's confirmation).

71. See Marple, *supra* note 39, at 1231–32 (introducing § 1329 as a provision to modify repayment plans post confirmation).

72. 11 U.S.C. § 1329(a) (2006).

73. *Id.*

74. See Carlson, *supra* note 70, at 594 (identifying the "inherent" time limit for a motion to modify plan payments under § 1329).

75. *Id.*

76. See *id.* at 617 (describing how plan modification was exercised by debtors and trustees to compensate for discrepancies in the debtor's plan payments and the debtor's actual income earned during the plan since the Chapter 13 plan was traditionally based on a historical calculation of the debtor's current monthly income).

77. See Marple, *supra* note 39, at 1232 (noting that § 1329(a)(1)–(4) lists the purpose for the enactment of § 1329 plan modification).

78. See, e.g., *In re Kagenveama*, 541 F.3d 868, 877 (9th Cir. 2008).

79. See, e.g., *In re Brown*, 219 B.R. 191, 194 (B.A.P. 6th Cir. 1998) (neglecting to establish specific requirements that must be shown in order for courts to approve a plan modification and acknowledging that

### C. Consumer Bankruptcy in the Financial Crisis

The financial crisis in the United States accelerated consumer bankruptcy filings due to a decrease in job security and earnings stability.<sup>80</sup> Ill-informed consumers became buried in debt as a result of loose lending standards and nationwide pressure on individuals to become homeowners by borrowing beyond their means.<sup>81</sup> In January 2011, an official U.S. government report on the financial crisis blamed the United States Federal Reserve for failing to stop dangerous lending practices at the consumer and corporate level.<sup>82</sup>

The impersonal, deregulated consumer credit relations surrounding predatory lending practices is one possible explanation for the increased consumer bankruptcy filings since the financial crisis.<sup>83</sup> Chapter 13 repayment plans are a step to rehabilitate open communication in lending relationships and to recompense creditors' loans.<sup>84</sup> There is contention over how best to determine "projected disposable income" when formulating a plan to repay creditors.<sup>85</sup>

Since the majority of courts have recently adopted the forward-looking approach, there has been tension among the courts regarding the dichotomy between the conflicting interpretations of a debtor's "projected disposable income."<sup>86</sup> The Supreme Court of the United States granted certiorari in *Hamilton v. Lanning* to resolve this debate among the courts.<sup>87</sup>

the Code does not establish such standards); *In re Witkowski*, 16 F.3d 739, 746 (7th Cir. 1994) (questioning when modification is appropriate under § 1329).

80. See Kai Ryssdal, *Bankrupt: Maxed Out in America*, AMERICAN RADIOWORKS (Apr. 2006), <http://americanradioworks.publicradio.org/features/bankruptcy/transcript.html> (noting that the most common reasons for bankruptcy have extended beyond the familiar events of medical problems, job loss, and domestic relations or divorces, due to unstable times in the financial crisis).

81. See William Poole, *Causes and Consequences of the Financial Crisis of 2007-2009*, 33 HARV. J.L. & PUB. POL'Y 421, 425–26 (2010) (explaining that a substantial factor contributing to the economic bubble leading to the financial crisis was the federal policies that encouraged home ownership and facilitated growth of the mortgage market).

82. Zachary A. Goldfarb & Brady Dennis, *Government Report Blames Regulators and Financial Institutions for Economic Crisis*, WASH. POST, Jan. 27, 2001, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/27/AR2011012702940.html> (citing FIN. CRISIS INQUIRY COMM'N, THE FIN. CRISIS INQUIRY REPORT, at xvii (Jan. 2011)).

83. Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (And Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 159–60 (2007).

84. See *id.* at 165–66 (noting the purpose of the BAPCPA's amendments to ensure that creditors, particularly those who are unsecured, recover more through Chapter 13 repayment plans than they would be repaid from Chapter 7 liquidations).

85. *Hamilton v. Lanning*, 130 S. Ct. 2464, 2469 (2010).

86. See Marple, *supra* note 39, at 1202 (noting of the split among the courts on reconciling § 1325(b)'s calculation of "disposable income" with § 1325(b)(1)(B)'s undefined term "projected disposable income"); see also *In re Pak*, 378 B.R. 257, 268 (B.A.P. 9th Cir. 2007) (Klein, J., concurring) (characterizing the contradiction between the mechanical calculation of "disposable income" and the premise of funding the plan with future income as a "classic paradox"); *In re Hardacre*, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006) (recognizing that "projected disposable income" has been subjected to conflicting interpretations since the term "disposable income" was redefined in the 2005 Amendments).

87. *Lanning*, 130 S. Ct. at 2469.

## III. THE COURT'S REASONING

Justice Alito delivered the majority opinion for the 8-to-1 decision of the Supreme Court of the United States in *Hamilton v. Lanning*, and held that a debtor's "projected disposable income" is to be determined by a forward-looking approach.<sup>88</sup> The Court affirmed the decision of the Court of Appeals that a bankruptcy court has discretion to consider a debtor's anticipated financial situation in exceptional cases where substantial changes in a debtor's income or expenses are known or virtually certain at the time of the repayment plan's confirmation.<sup>89</sup> In so holding, the Court adopted a natural interpretation of the Bankruptcy Code's language and reasoned that a forward-looking approach favors more realistic outcomes in providing bankruptcy protection to debtors while ensuring maximum repayment to creditors.<sup>90</sup>

First, the Court interpreted the undefined term "projected" according to its ordinary meaning.<sup>91</sup> A projection is commonly formulated based on past trends and adjusted according to relevant factors that may reasonably affect the final outcome.<sup>92</sup> By adding "projected" in the statutory text, Congress illustrated its intent to incorporate circumstantial adjustments when calculating a debtor's disposable income.<sup>93</sup> In effect, a future-oriented interpretation remains consistent with Congressional intent and parallels how bankruptcy courts historically have exercised judicial discretion to determine a debtor's projected disposable income when future circumstances were introduced that would materially change a debtor's income or expenses and impact plan payments.<sup>94</sup>

The Court further recognized that § 1325(b)(1)(B)'s statutory construction supports a forward-looking approach because the debtor's "projected disposable income" is determined "as of the *effective date* of the plan," and is "to be *received in the applicable commitment period*."<sup>95</sup> This language indicates that Congress intended

88. *Id.* at 2471.

89. *Id.* at 2478.

90. *See generally id.* at 1274–78.

91. *See id.* at 2471 (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.")).

92. *See Lanning*, 130 S. Ct. at 2471–72 (illustrating how "projected" is used to describe future events and outcomes, such as how a company calculating future sales will take into account anticipated events that may alter past trends).

93. *See id.* at 2472–73 (noting how Congress has inserted the term "projected" to modify terms to encompass a future-oriented meaning when interpreting such language; in contrast, Congress has expressly inserted "multiplied" when Congress mandates that a mathematical calculation is appropriate). Congress must have intended for "projected" to continue to carry a future-oriented meaning based on its historical use of the word. *Id.* at 2474.

94. *Id.* *See also supra* notes 39–40 and accompanying text (referencing pre-BAPCPA "projected disposable income" in which bankruptcy judges would exercise discretion to weigh circumstances affecting the debtor's future income to determine appropriate adjustments to the debtor's already loosely-calculated disposable income).

95. *See Lanning*, 130 S. Ct. at 2474 (emphasis added) (inferring Congress's word choice as intentionally directing courts to determine disposable income based on the debtor's *actual* ability to pay unsecured creditors since the commencement of the plan).

the repayment plan to reflect the debtor's ability to pay creditors at the date of the plan's confirmation, as well as during the plan's period.<sup>96</sup>

In cases where a debtor's income has substantially changed since the six-month looking-back period prior to filing, a mechanical approach would produce "senseless results" by discounting the debtor's most recent financial situation.<sup>97</sup> Where a debtor's disposable income increased during the Chapter 13 plan, the mechanical approach denies creditors potentially larger payments that the debtor has the means to make.<sup>98</sup> In cases such as *Hamilton v. Lanning*, where the debtor encountered a substantial financial loss after her "disposable income" was calculated, the debtor's financial situation stripped her of the ability to comply with the proposed plan calculated from past earnings.<sup>99</sup>

The Trustee proposed several solutions in response to the problems resulting from the mechanical approach, such as delaying filing for bankruptcy to keep any "extraordinary" income outside of the six-month looking-back calculation of current monthly income.<sup>100</sup> The Court rejected this alternative, as well as the Trustee's other proposed alternatives, because waiting to file until the debtor obtains a steady income can be risky and is often not a viable option when a debtor enters bankruptcy and needs immediate protection.<sup>101</sup>

Justice Scalia wrote the sole dissenting opinion in *Hamilton v. Lanning* and rejected the majority's holding because a forward-looking approach disregards Congressional intent inherent in the Bankruptcy Code's specific language defining "disposable income" and "current monthly income."<sup>102</sup>

Justice Scalia argued that the majority's interpretation of "projected disposable income" deviated from § 1325(b)(2)'s methodical calculation for "disposable income."<sup>103</sup> Had Congress intended to determine projected disposable income based on "best available evidence" or "relevant information," Congress would have included such language to capture a future-oriented meaning of "projected disposable income" distinct from the explicit definition of "disposable income."<sup>104</sup>

96. *Id.*

97. *See id.* at 2475–76 (ignoring realistic contingencies that may affect a debtor's income would render bankruptcy protection futile during the plan's period).

98. *Id.* at 2476.

99. *See id.* (explaining that when the debtor's disposable income is substantially lower during the plan's period, the mechanical approach denies the debtor Chapter 13 protection to qualify for a confirmable repayment plan).

100. *See Lanning*, 130 S. Ct. at 2476–77 (suggesting that the debtor: (1) delay filing, (2) delay reporting Schedule I's current monthly income until a six-month period that is more representative of the debtor's disposable income, (3) dismiss the petition and refile at a later date, or (4) file for Chapter 7 bankruptcy).

101. *See id.* (rejecting each alternative the Trustee suggested). Congress did not intend for such escape strategies the Trustee presented to operate as a "safety valve" for the mechanical approach. *Id.* at 2478.

102. *See id.* at 2478–79 (Scalia, J., dissenting) (preferring to adopt a strict interpretation of "disposable income" as the proper definition for "projected disposable income").

103. *See id.* at 2479 (emphasizing that Congress has already outlined a detailed definition of disposable income and to create such an open-ended definition for "projected" disposable income would be adding text not in the statute).

104. *Id.* at 2480. Congress has used "best available evidence," 8 U.S.C. § 1364(c)(2), and "any . . . relevant information," 25 U.S.C. § 2009(c)(1), in prior legislation. Because Congress omitted such phrases from §

Justice Scalia further predicted that the forward-looking approach would expose bankruptcy courts to future litigation by neglecting to set restrictions as to when and to what extent a court may consider other data.<sup>105</sup> Moreover, Justice Scalia reasoned that the mechanical approach is sufficient in determining “projected disposable income” because it already accounts for anticipated financial losses since enumerated expenses can arguably be derived from estimations of a debtor’s future finances.<sup>106</sup>

Justice Scalia proposed § 1329 as a remedy to curtail the “senseless results” that the majority claimed a mechanical approach could produce.<sup>107</sup> Section 1329 permits plan modifications in light of post-confirmation developments to a debtor’s financial situation.<sup>108</sup> Therefore, Justice Scalia concluded, the forward-looking approach is unnecessary and futile.<sup>109</sup>

Justice Scalia also found that the Trustee’s suggested alternative strategies were viable options for a debtor who encounters an unanticipated change in income.<sup>110</sup> Justice Scalia alleged that the majority wrongly dismissed a debtor’s ability to delay filing, to re-file at a later date, to request to delay reporting “current monthly income,” or to seek relief under Chapter 7.<sup>111</sup>

In conclusion, Justice Scalia cautioned that courts embracing broad interpretations of seemingly undefined text deprive Congressional language of its intended meaning embedded within its statutory construction.<sup>112</sup>

#### IV. ANALYSIS

The Supreme Court of the United States in *Hamilton v. Lanning* correctly adopted the forward-looking approach to determine a debtor’s “projected disposable income” under § 1325(b)(1)(B).<sup>113</sup> In so holding, the Court established a tool that will forecast a more realistic estimation of a debtor’s ability to repay creditors during the Chapter 13 plan.<sup>114</sup> Since the forward-looking approach essentially

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1325(b)(1)(B), the view that projected disposable income should be determined from a mechanical approach is consistent with Congress’s statutory construction. *Id.*

105. *Lanning*, 130 S. Ct. at 2479.

106. *See id.* at 2481 (arguing that “projected disposable income” is best calculated from a debtor’s “disposable income,” which is a projection in itself because it accounts for a debtor’s enumerated expenses that are arguably derived from estimations of a debtor’s anticipated losses).

107. *Id.* at 2482–83.

108. 11 U.S.C. § 1329(a)–(b) (2006).

109. *Lanning*, 130 S. Ct. at 2483.

110. *See id.* at 2483 (rejecting the Court’s dismissive application of a debtor’s right to pursue alternative legal remedies).

111. *Id.* at 2483–85.

112. *See id.* at 2485 (noting that taking liberties with text constrains Congress’s power to legislate what it intends to mean in the future).

113. *See id.* at 2469 (majority opinion) (holding that the forward-looking approach is the best determination of a debtor’s “projected disposable income,” as compared to the mechanical approach).

114. *See Lanning*, 130 S. Ct. at 2474 (rejecting a mechanical approach’s rigid calculation of disposable income based on a six-month looking-back period because it contradicts the future element of a debtor’s anticipated financial situation as of the effective date of the plan).

minimizes the necessity of § 1329 by taking into account a debtor's future finances, there should be greater restrictions on the use of plan modification in order to reduce harassment of debtors and nominal litigation.<sup>115</sup> By limiting a trustee's and creditors' right to request plan modification, debtors will receive the "fresh start" they are entitled to in bankruptcy, and creditors can move forward with their cash inflow from debtors' plan repayments.<sup>116</sup> The Court's decision in *Lanning*, coupled with a proposal to restrict application of plan modification after confirmation under § 1329, will ultimately restore lending relationships and ensure certainty in the financial markets.<sup>117</sup>

#### A. The Court Remained Loyal to Congressional Intent When Interpreting an Undefined Statutory Term

The Court properly deferred to the ordinary, future-oriented meaning of "projected" when interpreting "projected disposable income."<sup>118</sup> Contrary to Justice Scalia's dissenting opinion, the Court did not usurp Congressional power by "rewriting the statute."<sup>119</sup> Judicial interpretation of *undefined* statutory language cannot equate to editing explicit text because Congress never defined "projected disposable income" in the first place.<sup>120</sup> Therefore, the Court was acting completely within its authority of interpreting the "letter of the law."<sup>121</sup>

Moreover, a forward-looking approach best captures the essence of § 1325(b) in constructing realistic payment plans.<sup>122</sup> Chapter 13 plans encompass a future time period in which a debtor intends to apply his or her disposable income toward systematic plan payments to creditors.<sup>123</sup> The mechanical approach's calculation of "projected disposable income" based exclusively on a debtor's income received six months prior to filing potentially denies creditors assurance that the debtor will

115. See *infra* Part IV.B.

116. See *infra* Part IV.C.

117. See *infra* Part IV.B.- C.

118. See *Lanning*, 130 S. Ct. at 2471–72 (remaining consistent with Congressional intent by adopting the future-oriented, plain meaning of "projected"); see also Marple, *supra* note 39, at 1204 (explaining that statutory interpretation must begin with the plain meaning of the text).

119. See *Lanning*, 130 S. Ct. at 2479, 2485 (Scalia, J., dissenting) (claiming that the majority opinion's forward-looking interpretation of "projected disposable income" incorporates a future-oriented meaning that Congress expressly did not provide within the statutory text).

120. *In re Pak*, 378 B.R. 257, 264 n.7 (B.A.P. 9th Cir. 2007). The term "projected disposable income" appears in six sections of the Bankruptcy Code, none of which purports to define it. See, e.g., 11 U.S.C. §§ 1129(a)(15)(B), 1222(a)(4), 1225(b)(1)(B)–(C), 1322(a)(4), 1325(b)(1)(B) (2006).

121. See William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 101 COLUM. L. REV. 990, 996 (2011) (describing the judicial review process in which the Constitution grants courts the authority to interpret the "letter of the law").

122. See *In re Kibbe*, 361 B.R. 302, 314 (B.A.P. 1st Cir. 2007) (recognizing the purpose of Chapter 13 bankruptcy protection for debtors, while ensuring the maximum repayment to creditors within the debtor's means).

123. See *Lanning*, 130 S. Ct. at 2474 (discussing the forward-looking characteristic of the phrases "to be received in the applicable commitment period," "as of the effective date of the plan," and "will be applied to make payments" under § 1325(b)(1)(B)).

have the financial means to commit to the payments promised under the plan.<sup>124</sup> Therefore, a forward-looking interpretation is essential to formulating realistic repayment plans.<sup>125</sup>

*B. Plan Modification after Confirmation Should be Restricted Since a Forward-Looking Approach Adequately Captures a Debtor's Future Financial Situation*

Justice Scalia's dissenting opinion erred in relying on § 1329 post-confirmation plan modification to correct the "senseless results" produced by the mechanical approach.<sup>126</sup> In fact, the decision in *Hamilton v. Lanning* renders § 1329 less applicable absent unforeseeable, extraordinary circumstances.<sup>127</sup>

While it is arguable that a forward-looking approach does not necessarily render § 1329 useless by mimicking its purpose, the Court's decision substantially decreases the frequency of the need to revert to plan modification.<sup>128</sup> Since a debtor is to account for his or her known, or virtually certain, future changes in income at the onset of calculating his or her "projected disposable income" under the forward-looking approach, the significance of plan modification is limited to correcting only those unforeseeable events affecting a debtor's finances post-plan confirmation.<sup>129</sup>

Plan modification under § 1329 should be restricted because the few instances in which it is left applicable will merely burden bankruptcy proceedings with an administrative nightmare.<sup>130</sup> Several courts have struggled with the question whether to apply plan modification because § 1329 fails to set standards for circumstances in which a request for modification should be granted.<sup>131</sup> Commitment to smooth execution of Chapter 13 plans outweighs the time and administrative costs exhausted from judicial discretion determining appropriate

124. See *id.* (claiming that the mechanical approach "clashes repeatedly" with the future-oriented language used to describe "projected disposable income" under § 1325(b)(1)(B)).

125. See *In re Kibbe*, 361 B.R. at 314 (describing Congress's intentions for a Chapter 13 bankruptcy debtor to repay creditors the maximum the debtor can afford).

126. See *Lanning*, 130 S. Ct. at 2476 (discussing the potential problems that will occur if a debtor's income increases or decreases at the time of the effective date of the plan or at some point during the plan's period).

127. A forward-looking approach would incorporate a debtor's future changes in income absent unforeseen circumstances, rendering plan modification under § 1329 essentially only necessary for changes in a debtor's income that could not have been anticipated and accounted for. See *id.* at 2171 (describing the forward-looking approach in determining a debtor's "projected disposable income").

128. See *supra* text accompanying note 127; see also *In re Nowlin*, 576 F.3d 258, 267 (5th Cir. 2009) (providing an example where plan modification is a viable option for events that may be too speculative, such as the fluctuation of an investment market during the plan's period and its impact on the debtor's cash flow).

129. See *supra* notes 127–28 and accompanying text.

130. See Marple, *supra* note 39, at 1209–10 (noting that post-confirmation plan modification would be moot when a forward-looking approach already accounts for a debtor's ability to fund the plan in the first place).

131. See, e.g., *In re Brown*, 219 B.R. 191, 194–95 (B.A.P. 6th Cir. 1998) (neglecting to provide for specific requirements that must be shown in order to approve a request for plan modification after recognizing the lack of established standards for plan modification in the Code); see also *In re Witkowski*, 16 F.3d 739, 746 (7th Cir. 1994) (reviewing the lower court's decision on an abuse of discretion standard in applying § 1329, which has few guiding principles outlining proper application).



plan modifications.<sup>132</sup> Since a debtor can incorporate his or her future finances into the formulation of a Chapter 13 plan with the forward-looking approach, even minimal use of plan modification is costly and wasteful of resources.<sup>133</sup>

Moreover, plan modification gives creditors the opportunity to harass debtors by revisiting their financial situations to attain greater returns.<sup>134</sup> The possibility of trustees and creditors abusing their ability to request plan modification, which will generate nominal litigation over potentially insignificant plan adjustments, mitigates the significance of § 1329 absent unforeseeable, extraordinary circumstances.<sup>135</sup>

Courts must recognize that the goal of the Bankruptcy Code is to give the “honest but unfortunate debtor” a fresh start.<sup>136</sup> To ensure this objective is achieved, plan modification under § 1329 should be strictly limited to adjusting plan payments due to unforeseeable substantial changes in a debtor’s wages. If a debtor encounters financial distress outside the scope of employment during the plan period, bankruptcy courts should grant a discharge of the debt in the amount of the the debtor’s newly reduced disposable income less his or her promised plan payments. Conversely, when a debtor receives a surplus of income outside of his or her wage earnings during the plan, the debtor should be allowed to retain the additional income as he or she normally would, absent a request for plan modification from the trustee or from a creditor.<sup>137</sup>

A substantial jolt in a debtor’s wages is the appropriate metric for application of plan modification.<sup>138</sup> Such an amendment would be consistent with the principle of wage garnishment, where a percentage of the debtor’s wages are the core stream of

132. See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (noting that a simplistic administrative process may outweigh the occasional “economic loss” from systems undercutting the very economic ends they seek to achieve). For example, the money a trustee or creditor may seek to recover through plan modification may be counter-productive as compared to the administrative resources expended to reach the economic ends sought to be achieved. *Id.*

133. See *supra* notes 130–32. A trustee’s or a creditor’s request for plan modification may also be denied after the court has expended potentially countless hours and resources to determine whether plan modification was appropriate. See 11 U.S.C. § 1329(b)(2) (2006) (stating the possibility of a motion for plan modification being denied after notice and a hearing).

134. See *WARREN & WESTBROOK, supra* note 27, at 324 (noting that there is always a chance that the trustee or creditor is merely attempting to revisit a debtor’s income and expenses, which may not have changed, when requesting plan modification).

135. Courts have denied motions for plan modification at the expense of the debtor. See, e.g., *In re Morrow*, 397 B.R. 876, 879 (Bankr. N.D. Ohio 2008) (denying plan modification according to reduced interest rates at the request of the debtor).

136. See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367, 373 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (describing the principal purpose of the Bankruptcy Code to provide relief to debtors who file in good faith)).

137. See *Carlson, supra* note 70, at 628 (describing the legal process where a debtor gets a surplus of income during a Chapter 13 plan, which legally becomes the property of the debtor subject to potential seizure from plan modification).

138. See *WARREN & WESTBROOK, supra* note 27, at 54–55 (taking note of a creditor’s right to seek a writ of garnishment to reserve a portion of the debtor’s salary or service wages toward repayment of his or her debt obligation to the creditor).

income that creditors can dip into as a form of repayment.<sup>139</sup> However, plan modification should not extend beyond the scope of wages; otherwise, vulnerable debtors would be kept at a stand-still and buried in debt.<sup>140</sup>

In considering the proposal to give debtors a “break” by limiting the use of § 1329 plan modification, it is important to consider the economic undertones that pushed consumers into Chapter 13 bankruptcy to begin with.<sup>141</sup> During George W. Bush’s presidency, where home ownership was encouraged, the economy experienced a mass-marketing of credit.<sup>142</sup> Financial industries and businesses preyed on populations of the sick, uninsured, divorced, and financially naive who were eager to borrow money.<sup>143</sup> By 2005, 97% of all household indebtedness was comprised of mortgage debt and consumer credit (e.g., credit card debt).<sup>144</sup>

A pro-debtor sentiment in Chapter 13 bankruptcy proceedings is essential to giving debtors a chance to reshape their finances, while making an honest effort to repay their debt.<sup>145</sup> To do otherwise would be to the detriment of the debtor already burdened with debt obligations and will discourage future lending relationships. The U.S. economy has stabilized from the credit industry’s deceptive mechanisms that enticed lending years ago.<sup>146</sup> Bankruptcy courts must rightfully support consumer debtors to renew lending relationships and restore economic growth.

*C. A Forward-Looking Approach Will Help Restore Stability in the Financial Markets by Ensuring Transparency in Lending Relationships*

The Court’s decision in *Hamilton v. Lanning* will ultimately create a significant impact on the financial markets by quantifying the risk of creditors’ businesses. A forward-looking approach encourages a sharing of knowledge between a debtor and

139. See G. Wogan Bernard, *Garnishing the Congressional Intent: Protecting Debtor Wages in Bank Accounts Under the Federal and Louisiana Wage Garnishment Exemption Statutes*, 66 LA. L. REV. 233, 235–36 (2005) (describing how wage garnishment allows the attachment of a debtor’s weekly disposable earnings, which can be extracted from compensation paid as wages, salary, or commission).

140. See *id.* at 235 (recognizing that wage garnishment must be limited because unrestricted state garnishing laws lead to “devastating results for a debtor and his family”).

141. Many creditors influenced heavy borrowing beyond one’s financial means, and such lending practices have led to increased consumer bankruptcy filings. See WARREN & WESTBROOK, *supra* note 27, at 354 (describing the incessant push from creditors to give riskier loans that ultimately contributed to the rise in consumer bankruptcy filings).

142. See *id.* at 339 (describing the credit industry’s behavior that applauded the “democratization of credit”).

143. MARK JICKLING, CONG. RESEARCH SERV., RS 20777, CONSUMER BANKR. & HOUSEHOLD DEBT 5 (2002). See also Michelle Singletary, *Elizabeth Warren: The Watchdog Consumers Will Thank*, WASH. POST, Dec. 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/10/AR2010121007486.html> (noting that most of the cost of credit was hidden in complex, incomprehensible legalese documents).

144. MARK JICKLING, CONG. RESEARCH SERV., RS 20777, CONSUMER BANKR. & HOUSEHOLD DEBT 4 (2002).

145. See WARREN & WESTBROOK, *supra* note 27, at 354 (remaining consistent with the U.S. bankruptcy system’s history of being pro-debtor).

146. See *The Impact of the Recovery Act on Economic Growth: S. Joint Econ. Comm. Comm. Hearing*, (Oct. 28, 2009) (noting that the financial system has become stable since the recession ended due to fiscal policy efforts).

his or her creditors, which increases the transparency of the debtor's true financial situation to reveal a more accurate figure of repayment creditors can expect.<sup>147</sup>

A forward-looking calculation of "projected disposable income" considers known or virtually certain occurrences that will affect the debtor's budget during the plan's period.<sup>148</sup> Debtors should report all substantial changes in their future financial circumstances due to § 1325(a)'s condition that the plan is to be proposed in good faith.<sup>149</sup> This provision, in conjunction with the incentive to accurately portray a debtor's future income, will promote honest submissions of future earnings and losses to structure a realistic Chapter 13 plan.<sup>150</sup>

The American Bankruptcy Institute has stated that the health of lending relationships is threatened by bankruptcy cases where creditors are repaid less than anticipated according to the repayment plans.<sup>151</sup> The Court's adoption of the forward-looking approach will decrease the frequency of underpayment to creditors by more accurately projecting a debtor's disposable income available for a Chapter 13 plan.<sup>152</sup> Smooth execution of repayment plans will help sustain healthy lending relationships and build an honest business environment.<sup>153</sup>

Individual consumer creditors, as well as corporate and small business creditors, will benefit from a forward-looking approach because a future-oriented "projected disposable income" requires debtors to identify future known changes in their income.<sup>154</sup> In turn, creditors will be more confident of their incoming cash flow from the repayment plan based on their more accurate knowledge of the debtor's

147. By adopting a forward-looking approach, the debtor communicates his or her anticipated budget by accounting for any expected changes in income when calculating "projected disposable income." See *Hamilton v. Lanning*, 130 S. Ct. 2464, 2476 (2010) (noting how the process of repaying creditors during the plan's period can more easily be executed through a forward-looking approach by accounting for anticipated changes in the debtor's income).

148. See *id.* at 2478 (holding that when calculating "projected disposable income," bankruptcy courts may account for "changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation").

149. A plan will only be confirmed if it has been proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1325(a)(3) (2006).

150. See *In re Kibbe*, 361 B.R. 302, 315 (B.A.P. 1st Cir. 2007) (describing the overall objective that the forward-looking approach attempts to achieve: "a fresh start for the honest debtor and a uniform and equitable distribution to creditors"). It is through reaching this goal that Congress intended to provide bankruptcy relief to *honest* debtors who will propose Chapter 13 repayment plans based on their true disposable income. See *id.* (reiterating the mandate of the Code to help the "honest debtor").

151. AM. BANKR. INST., BANKR. FILING STATISTICS (2010), available at [http://www.abiworld.org/Content/NavigationMenu/NewsRoom/BankruptcyStatistics/Bankruptcy\\_Filings\\_1.htm](http://www.abiworld.org/Content/NavigationMenu/NewsRoom/BankruptcyStatistics/Bankruptcy_Filings_1.htm). See also WARREN & WESTBROOK, *supra* note 27, at 336 (stating that the debtor-creditor relationship is one of the most important social and political relationships).

152. See *Hamilton v. Lanning*, 130 S. Ct. 2464, 2475–76 (2010) (describing how a forward-looking approach can avoid "senseless results" that a mechanical approach would yield if future income was not accounted for).

153. "Small businesses are reacting differently to the economic mayhem depending on their cash flow concerns and funding prospects." Bobby Martin & Joe Hagan, *Remaining in Risk Position – A Focus on Credit Relationship Management*, TNS, at 3 (Oct. 2010), [http://www.tns-us.com/files/white\\_papers/a\\_focus\\_on\\_credit\\_relationship-29.pdf](http://www.tns-us.com/files/white_papers/a_focus_on_credit_relationship-29.pdf).

154. See *In re Kibbe*, 361 B.R. at 314–15 (noting that creditors benefit from a repayment plan that ensures debtors repay the maximum they can afford).

financial situation.<sup>155</sup> Creditors can then pursue better business decisions from the risk reduction standpoint buttressed by a more tangible faith that a debtor has the means to pay as promised.<sup>156</sup>

Creditors' confidences in their cash flow will better allow those businesses, banks, and consumers to manage their business decisions.<sup>157</sup> A creditor can strategize investments for capital or expansion based on the knowledge that a debtor is virtually certain to receive a work promotion or inherit money from a trust fund during the plan's period.<sup>158</sup> Conversely, a Chapter 13 plan that accounts for a debtor's known future financial loss allows creditors to write off their losses, which may prompt creditors to be conservative with their investments or to postpone certain expenditures.<sup>159</sup> A debtor's sharing of knowledge enables creditors to quantify their risk and to make better business decisions supported by certainty in their cash flow budget.<sup>160</sup>

Today's financial markets are fraught with debt, substantiating an immobilizing effect on lending throughout all sectors of the economy.<sup>161</sup> Businesses are striving to maintain cash flow to secure their survival in the current economic crisis.<sup>162</sup> The Court's decision in *Hamilton v. Lanning* will establish a small wrinkle within the lending industry which, when multiplied by the volumes of Chapter 13 bankruptcy filings, will spread reassurance throughout the business world. This forward-looking model is a form of transparency that reduces risk to creditors by assuring adequate cash flow.<sup>163</sup> A future-oriented interpretation of "projected disposable income" under § 1325(b)(1)(B) will instill businesses with the necessary confidence to help bolster economic recovery.<sup>164</sup>

## V. CONCLUSION

When interpreting "projected disposable income" under § 1325(b)(1)(B), the Supreme Court of the United States adopted the forward-looking approach to realistically determine a debtor's ability to repay creditors during the Chapter 13

155. Cash flow measures a business's cash inflows and outflows over a specified period of time. CASH FLOW BUDGET, BUSINESS OWNER'S TOOLKIT, [http://www.toolkit.com/small\\_business\\_guide/sbg.aspx?nid=P06\\_4300](http://www.toolkit.com/small_business_guide/sbg.aspx?nid=P06_4300).

156. *See id.* (noting that the purpose of a cash flow budget is to anticipate how to best use the cash based on what the business is anticipated to take in as compared to its expenses).

157. *See id.* (indicating that the more certainty a business has of its cash flow budget, the quicker that business will be able to take corrective action and invest, save, or expand the business).

158. *See id.* (describing how a positive cash flow allows a business to consider expansion with less risk based on a good indication of future cash inflow).

159. *See id.* (discussing creditors' options, such as lowering investment in accounts receivable or inventory, or looking to short-term loans as a substitute for the money the debtor would have repaid).

160. *See* Martin & Hagan, *supra* note 153 and accompanying text.

161. *See* Martin & Hagan, *supra* note 153, at 1 (discussing the economic impact on small business lending and how small businesses are trying to maintain cash flow to survive).

162. *See supra* note 161 and accompanying text.

163. *See supra* notes 154–56.

164. *See* Martin & Hagan, *supra* note 153, at 1 (noting that the economy is slowly making progress and small financial improvements will bring renewed focus to developing business lending solutions).

plan's period.<sup>165</sup> The Court held that when a debtor's "disposable income" calculation is not indicative of his or her income at the commencement of the plan, the bankruptcy court reserves the right to account for known or virtually certain substantial changes that will impact a debtor's financial situation.<sup>166</sup>

Limited application of § 1329 plan modification will further increase stability in bankruptcy proceedings by suppressing nominal litigation over trivial alterations in a debtor's Chapter 13 plan since a forward-looking determination of "projected disposable income" already incorporates the debtor's future budget.<sup>167</sup> Moreover, the forward-looking approach increases the transparency of a debtor's true financial situation and consequently reduces risk in creditors' businesses by assuring adequate cash flow.<sup>168</sup> A policy of open communication between debtors and creditors facilitated through the forward-looking approach will ultimately renew lending relationships today and restore economic growth tomorrow.<sup>169</sup>

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165. See *Hamilton v. Lanning*, 130 S. Ct. 2464, 2478 (2010) (holding that a forward-looking approach will account for changes in a debtor's income that are known or virtually certain at the time of plan confirmation).

166. *Id.* at 2471.

167. See *supra* Part IV.B.

168. See *supra* Part IV.C.

169. See *supra* Part IV.C.