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by

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The goal of filing a bankruptcy case under chapter 13 of the Bankruptcy Code[1] is the successful completion of a confirmed chapter 13 plan, leading to a discharge of the debtor. In order to be confirmed, the chapter 13 plan filed by the debtor[2] must satisfy the requirements set forth in § 1322(a),[3] and may include any of the provisions described in § 1322(b).[4] Other provisions in

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[1]Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978), codified at 11 U.S.C. § 101-1532 (referred to herein as the "Code"). All sections referred to in this article are, unless otherwise specified, sections of the Code. Chapter 13 is codified in 11 U.S.C. §§ 1301-1330.

[2]Only the debtor may file a plan under chapter 13. *See* 11 U.S.C. § 1321. The debtors who are eligible to file for bankruptcy protection under chapter 13 are described in 11 U.S.C. § 109(e).

[3]Section 1322(a) states that the plan:

> (1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
> (2) shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;
> (3) if the plan classifies claims, shall provide the same treatment for each claim within a particular class; and
> (4) notwithstanding any other provision of this section, may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

[4]Section 1322(b) states that:

> (b) Subject to subsections (a) and (c) of this section, the plan may—
> (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;
> (2) modify the rights of holders of secured claims, other than a claim secured

§ 1322 also limit what may or must be in a chapter 13 plan.[5] All of these additional provisions (other than the one limiting the length of a chapter 13 plan) were added since the original enactment of the Code in 1978.[6]

A plan that complies with § 1322 must also satisfy the nine requirements of § 1325(a) to be confirmed.[7] In addition, if "the trustee or the holder of any

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only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity;

(10) provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims; and

(11) include any other appropriate provision not inconsistent with this title.

[5]Section 1322(c) permits defaults with respect to a lien on debtor's principal residence to be cured pursuant to a chapter 13 plan until the residence is sold at a regularly-conducted foreclosure sale, and states that if the last payment on the original payment schedule for a debt secured by the debtor's principal residence may be cured and maintained under § 1322(a)(5).

Section 1322(d) specifies the maximum length of the chapter 13 plan, which depends on whether the current monthly income of the debtor and the debtor's spouse combined, when multiplied by twelve, is less than the median family income for the applicable state for a family of the same size as that of the debtor. If it is not less, the maximum length of the plan is five years; if it is less, the maximum length of the plan is three years unless the court, for cause, approves a longer period not to exceed five years.

Section 1322(e) requires that the cure payments for defaults be determined in accordance with applicable non-bankruptcy law.

Section 1322(f) forbids the material alteration of the terms of a loan from a pension plan, and states that amounts required to make such loan payments do not constitute "disposable income" under § 1325.

[6]Subsections (c) and (e) of § 1322 were added by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (Oct. 22, 1994). Subsection (f) was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (Apr. 20, 2005). Subsection (d) (formerly subsection (c)), was renumbered in 1994, and substantially amended in the 2005 amendments. Subsections 1322(a)(4) and 1325(b)(10) were also added by the 2005 amendments.

[7]The nine requirements in 11 U.S.C. § 1325(a) are:

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

allowed unsecured claim objects to confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan," the chapter 13 plan meets the so-called disposable income test of § 1325(b).[8] The disposable income test was added to § 1325 by the Bankruptcy Amend-

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(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
(3) the plan has been proposed in good faith and not by any means forbidden by law;
(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
(5) with respect to each allowed secured claim provided for by the plan—
(A) the holder of such claim has accepted the plan;
(B)(i) the plan provides that—
(I) the holder of such claim retain the lien securing such claim until the earlier of—
(aa) the payment of the underlying debt determined under nonbankruptcy law; or
(bb) discharge under section 1328; and
(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and
(iii) if—
(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and
(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or
(C) the debtor surrenders the property securing such claim to such holder;
(6) the debtor will be able to make all payments under the plan and to comply with the plan;
(7) the action of the debtor in filing the petition was in good faith;
(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and
(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

[8]Section 1325(b) provides as follows:

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan -

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(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—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $675 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period"—

(A) subject to subparagraph (B), shall be—

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $675 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

ments and Federal Judgeship Act of 1984.[9]

A confirmed plan is binding on the debtor and the debtor's creditors.[10] However, after confirmation and before completion of the payments required by the confirmed plan, the debtor's financial circumstances may change to such an extent that either the debtor is no longer able to make the required payments, or the debtor would be able to make payments in a higher amount than the plan calls for. Section 1329(a) permits the debtor, the trustee or the holder of an allowed unsecured claim to request modification of a confirmed chapter 13 plan in certain limited ways.[11] The modified plan must comply with the requirements of §1329(c), which generally limits the duration of the modified plan to that period applicable to the original plan under §1325(b)(1), but in any event may not provide for payments for a period in excess of five years from the first date on which payments were due.[12] In addition, the modified plan must, pursuant to § 1329(b)(1),[13] comply with "sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section

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The dollar amounts included in § 1325(b)(3)(C) and § 1325(b)(4)(A)(ii)(III) are adjusted every three years pursuant to §104, and the figures above reflect the figures as adjusted effective April 1, 2013.

[9]Pub. L. No. 98-353, 98 Stat. 333 (July 10, 1984).

[10]11 U.S.C. § 1327.

[11]The only modifications permitted under 11 U.S.C. § 1329(a) are the following:

> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
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> (2) extend or reduce the time for such payments;
>
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or
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> (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that—
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> (A) such expenses are reasonable and necessary;
>
> (B)(i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or
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> (ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and
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> (C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title; and upon request of any party in interest, files proof that a health insurance policy was purchased.

[12]Section 1329(c) states that the modified plan "may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time."

[13]11 U.S.C. § 1329(b)(1).

1325(a) of this title."[14]

Notably absent from the list of sections applicable to a modified plan under § 1329(b)(1) is any reference to the disposable income test of § 1325(b). As a result, most courts have concluded that a modified plan does not have to provide that all of the debtor's projected disposable income to be received during the applicable commitment period be applied to make payments to unsecured creditors under the modified plan. However, the absence of specific statutory language requiring such application leaves open the question of whether, based on other provisions contained in chapter 13, the test is nevertheless required. In this article, I will first look at the cases analyzing the issue of whether a modified chapter 13 plan must comply with the requirements of § 1325(b), which are sharply divided in their conclusions. I will then examine the legislative language and history of §§ 1329 and 1325, from the time the disposable income test was first included in the Code through the 2005 amendments to the Code that incorporated the means-testing computations. Based on the legislative history, I assert that courts should reach the conclusion that Congress intended the disposable income test to apply throughout the duration of a chapter 13 plan. Finally, I will provide my own interpretation of why courts have reached the contrary conclusion, and suggest that after the Supreme Court's decision in *Hamilton v. Lanning*[15] there is no longer any reason to permit a modified chapter 13 plan to be approved without satisfying all the requirements that would be necessary if that plan had been presented for confirmation in the first instance. Section 1329 should be interpreted to require that chapter 13 debtors devote all of their projected disposable income to satisfy unsecured debts for the full applicable commitment period to obtain modification of their chapter 13 plans.

I. INTERPRETATIONS OF SECTION 1329—TEXTUALISM, INCORPORATION, AND OTHER THEORIES

As suggested by one of the leading treatises on chapter 13, "the interaction of the disposable income test in § 1325(b) and the modification of plans under § 1329 was not well conceived."[16] On the one hand, the provisions of § 1329(a) that expressly permit the trustee or the holder of an allowed unsecured claim to seek modification of a confirmed chapter 13 plan strongly

[14]11 U.S.C. § 1323(c) states that "[a]ny holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection."

[15]560 U.S. 505 (2010).

[16]Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 255.1, at ¶ 15, Sec. Rev. June 15, 2004, www.Ch13online.com.

suggest that these parties may attempt to capture any increased disposable income available to the debtor through plan modification. On the other hand, § 1329(b)(1), which lists the provisions of the Code applicable to any modification of a chapter 13 plan, does not expressly include § 1325(b). Under that subsection, if the trustee or any holder of an allowed unsecured claim objects to confirmation of a chapter 13 plan, the plan must provide that all the debtor's projected disposable income to be received in the applicable commitment period—defined in § 1325(b)(4)—be applied to make payments to unsecured creditors.

The issue of whether a modified chapter 13 plan has to comply with § 1325(b)[17] has arisen in two contexts. First, can the debtor or the trustee modify a confirmed plan to change the "applicable commitment period" from that period specified in § 1325(b)(4)?[18] Second, can a court approve a modified chapter 13 plan that does not comply with the projected disposable income test of § 1325(b)(1)?[19] Ultimately, in both situations the issue is the same—are the requirements of § 1325(b) applicable to plan modifications?[20]

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[17]There are also many cases that attempt to interpret the language requiring dedication of the debtor's "projected disposable income to be received in the applicable commitment period" to confirmation of a chapter 13 plan in the first instance. Courts are divided over whether the language creates a temporal requirement for plan duration or merely measures the amount of payments that must be made to unsecured creditors over the life of the plan. *Compare In re* Flores, 735 F.3d 855 (9th Cir. 2013) (en banc); Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011); *In re* Tennyson, 611 F.3d 873, 879 (11th Cir. 2010); *In re* Frederickson, 545 F.3d 652, 550 (8th Cir. 2008) (temporal requirement) *with In re* Burrell, No. 08-71716, 2009 WL 1851104, at *3-*5 (Bankr. C.D. Ill. June 29, 2009); Dehart v. Lopatka (*In re* Lopatka), 400 B.R. 433, 436-40 (Bankr. M.D. Pa. 2009) (requirement of minimum payments). If the court embraces the minimum payments approach, a debtor who receives additional disposable income after plan confirmation could modify the confirmed chapter 13 plan to reduce the duration of the plan and pay off creditors early even if § 1325(b) is applicable to plan modifications. Indeed, the right of the trustee and unsecured creditors to seek modification of a confirmed plan to capture future disposable income is emphasized by those courts that find the applicable commitment period to be a temporal requirement. *See Baud*, 634 F.3d at 356; *Tennyson*, 611 F.3d at 879.

[18]Although there are many examples of debtors seeking to modify the applicable commitment period, generally by reducing it from five years to a shorter period, *see* cases cited in note 20 *infra*, it is rare for the trustee or a creditor to seek to extend the duration of a plan from three years to five years. *See In re* Moglia, No. 11-35022, 2014 Bankr. LEXIS 5197 (Bankr. D. Or. Dec. 30, 2014) (rejecting motion).

[19]Other cases interpret the term "disposable income" in deciding whether property that the debtor receives after confirmation of a chapter 13 plan is subject to the requirements of § 1325(b), even if that provision applies to a plan modification, *see, e.g., In re* Burgie, 239 B.R. 406 (B.A.P. 9th Cir. 1999) (assuming without deciding that § 1325(b) applies to modification, but concluding that sale of homestead after plan confirmation does not create disposable income); *In re* McCollum, 363 B.R. 789, 795 (E.D. La. 2007) (affirming bankruptcy court's conclusion that proceeds from sale of home do not constitute disposable income); *In re* Peebles, 500 B.R. 270, 279 (Bankr. S.D. Ga. 2013) (holding that post-confirmation inheritance did not constitute disposable income); *In re* McAllister, 510 B.R. 409 (Bankr. N.D. Ga. 2014) (finding that § 1325(b), even if applicable to modifications, does not include proceeds from excluded property as disposable income).

[20]Although the legal issue is the same, the context in which the required modification arises definitely leads to different results in the courts. When an above-median income debtor confirms a five-year plan and then suffers a loss of income from the base amount used to determine "current monthly income" for pur-

Most courts considering whether a modified plan must satisfy the requirements of § 1325(b) have concluded that it does not. The most-frequently cited reason for reaching that conclusion is textual: §1329(b)(1), which itemizes the provisions that "apply" to any chapter 13 plan modification, lists § 1325(a) but not § 1325(b).[21] Applying the traditional Latin maxim of "*expressio unius est exclusio alterius*" (the expression of one thing is the exclusion of another),[22] or simply noting that §1325(b) is not listed among the applicable provisions,[23] these courts conclude that Congress did

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poses of the "applicable commitment period" in § 1325(b)(4), courts are reluctant to find that § 1325(b) is applicable when the debtor proposes a plan modification to reduce the applicable commitment period to less than five years. *See, e.g., In re* Runnels, No. 13-30084, 2015 Bankr. LEXIS 1597 (Bankr. W.D.N.C. May 11, 2015); *In re* Wills, No. 10-72120, 2014 WL 2442275 (Bankr. C.D. Ill. May 30, 2014); *In re* Barnes, 506 B.R. 777 (Bankr. E.D. Wis. 2014); *In re* Tibbs, 478 B.R. 458 (Bankr. S.D. Fla. 2012); *In re* Grutsch, 453 B.R. 420 (Bankr. D. Kan. 2011); *In re* Davis, 439 B.R. 863 (Bankr. N.D. Ill. 2010); *In re* Kearney, 439 B.R. 694 (Bankr. E.D. Wis. 2010); *In re* McCully, 398 B.R. 590 (Bankr. N.D. Ohio 2008); *In re* Hall, No. 06-61733, 2008 WL 2388628 (Bankr. N.D. Ohio June 11, 2008); *In re* White, 411 B.R. 268 (Bankr. W.D.N.C. 2008); *In re* Howell, No. 07-80365, 2007 WL 4124476, at *2 (Bankr. W.D. La. Nov. 19, 2007); *In re* Ewers, 366 B.R. 139 (Bankr. D. Nev. 2007); *In re* Ireland, 366 B.R. 27 (Bankr. W.D. Ark. 2007). *But see In re* Buck, 443 B.R. 463 (Bankr. N.D. Ga. 2010); *In re* King, 439 B.R. 129 (Bankr. S.D. Ill. 2010); *In re* Clevenger, 430 B.R 539 (Bankr. W.D. Mo. 2009).

But when a debtor receives unanticipated income and either proposes a modified plan that would reduce the applicable commitment period through an early payoff, or objects to a plan modification proposed by the trustee to capture the increased income, courts are more likely to conclude that § 1325(b) should be applicable. *See, e.g.*, Barbosa v. Solomon, 235 F.3d 31 (1st Cir. 2000); *In re* Williams, No. 09-42400, 2014 WL 274307 (Bankr. D.N.J. Jan. 24, 2014); *In re* Carreiro, No. 11-17863, 2013 WL 2353784 (Bankr. M.D. Fla. May 30, 2013); *In re* Cormier, 478 B.R. 88 (Bankr. D. Mass. 2012); *In re* Heideker, 455 B.R. 263 (Bankr. M.D. Fla. 2011); *In re* Rhymaun, No. 11-20092, 2011 WL 9378787 (Bankr. S.D. Fla. Aug. 8, 2011); *In re* Heyward, 386 B.R. 919 (Bankr. S.D. Ga. 2008); *In re* Baxter, 374 B.R. 292 (Bankr. M.D. Ala. 2007); *In re* Keller, 329 B.R. 697 (Bankr. E.D. Cal. 2005); *In re* Carey, No. 02-75502, 2004 WL 3623505 (Bankr. N.D. Ill. Nov. 2, 2004); *In re* DeFrehn, No. 02-20290, 2003 WL 25273838 (Bankr. D. Idaho June 13, 2003); *In re* Flaming, No. 02-033680, 2003 WL 22848925 (Bankr. D. Idaho Nov. 10, 2003); *In re* Martin, 232 B.R. 29 (Bankr. D. Mass. 1999). *But see* Mattson v. Howe (*In re* Mattson), 468 B.R. 361 (B.A.P. 9th Cir. 2012); DeHart v. Eckert (*In re* Eckert), 485 B.R. 77 (Bankr. M.D. Pa. 2013); *In re* Hall, 442 B.R. 754 (Bankr. D. Idaho 2010).

[21]Section 1329(b)(1) states that "Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section."

[22]*See, e.g.*, Neidich v. Lorenzo (*In re* Lorenzo), No. 13-23100, 2014 WL 1877408, at *4 (S.D. Fla. May 9, 2014); *In re* Tibbs, 478 B.R. 458, 464 (Bankr. S.D. Fla. 2012); *In re* Grutsch, 453 B.R. 420, 425 (Bankr. D. Kan. 2011); *In re* Davis, 439 B.R. 863, 867 (Bankr. N.D. Ill. 2010).

[23]*See, e.g.*, Hamilton v. Lanning, 560 U.S. 505, 533 (2010) (Scalia, J., dissenting) (dictum); Mattson v. Howe (*In re* Mattson), 468 B.R. 361, 372-73 (B.A.P. 9th Cir. 2012); Sunahara v. Burchard (*In re* Sunahara), 326 B.R. 768, 781 (B.A.P. 9th Cir. 2005); Forbes v. Forbes (*In re* Forbes), 215 B.R 183, 191 (B.A.P. 8th Cir. 1997); King v. Robenhorst, No. 11-573, 2011 WL 5877081, at *3 (E.D. Wis. Nov. 23, 2011); *In re* McCollum, 363 B.R. 789, 798 (E.D. La. 2011); *In re* Runnels, No. 13-30084, 2015 Bankr. LEXIS 1597, at *25-26 (Bankr. W.D.N.C. May 11, 2015); *In re* Moglia, No. 11-35022, 2014 Bankr. LEXIS 5197, at *4 (Bankr. D. Or. Dec. 30, 2014); *In re* Pautin, 521 B.R. 754, 762 (Bankr. W.D. Tex. 2014); *In re* Swain, 509 B.R. 22, 30 (Bankr. E.D. Va. 2014); *In re* Ramsey, 507 B.R. 736 739 (Bankr. D. Kan. 2014); *In re* Powers, 507 B.R. 262, 269 (Bankr. C.D. Ill. 2014), *rev'd on other grounds sub nom.* Germeraad v. Powell, No. 14-3129, 2014 U.S. Dist. LEXIS 165920 (C.D. Ill. Oct. 27, 2014); *In re* Wills, No. 10-72120, 2014 WL 2442275, at *4 (Bankr. C.D. Ill. May 30, 2014); *In re* Barnes, 506 B.R. 777, 782 (Bankr. E.D. Wis.

not intend to make § 1325(b) applicable to chapter 13 plan modifications.

The second reason sometimes given by courts that decline to find § 1325(b) applicable to plan modifications is the way Congress referred to § 1325(a) in §1329(b)(1), as compared with the manner in which Congress referred to other applicable sections. Under §1329(b)(1), Congress provided that "Sections 1322(a), 1322(b) and 1323(c)" are applicable to chapter 13 plan modifications, but then added that "the requirements of Section 1325(a)" are also applicable. Because compliance with § 1325(b) is not *required* under § 1325(a) unless either the trustee or an unsecured creditor objects to a plan, these courts conclude that Congress intended to exclude § 1325(b) by using the word "requirements" in § 1329(b)(1).[24]

Third, courts also note that § 1325(b) by its terms is triggered only "[i]f the trustee or the holder of an allowed unsecured claim objects to *the confirmation of the plan*."[25] Because these courts maintain that a modified plan is not subject to "confirmation," but only approval of the modification, § 1325(b) can never be applicable in that context.[26]

Fourth, if § 1325(b) (insofar as it specifies a required applicable commit-

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2014); *In re* Tengan, No. 13-00225, 2014 WL 5306620, at *2 (Bankr. D. Haw. Oct. 15, 2014); *In re* Salpietro, 492 B.R. 630, 637 (Bankr. E.D.N.Y. 2013); DeHart v. Eckert (*In re* Eckert), 485 B.R. 77, 82 (Bankr. M.D. Pa. 2013); *In re* Martin, No. 10-64790, 2010 WL 6196566, at *4 (Bankr. N.D. Ohio Nov. 27, 2013); *In re* Hargis, No. 09-64398, 2013 WL 4514090, at *4 (Bankr. N.D. Ohio Aug. 23, 2013); *In re* Coay, No. 09-71814, 2012 WL 2319100, at *6 (Bankr. C.D. Ill. June 19, 2012); *In re* Crim, 445 B.R. 868, 871 (Bankr. M.D. Tenn. 2011); *In re* Hall, 442 B.R. 754, 760-61 (Bankr. D. Idaho 2010); *In re* Prieto, No. 08-3308, 2010 WL 3959610, at *2 (Bankr. M.D. Ga. Sept. 22, 2010); *In re* Kearney, 439 B.R. 694, 696 (Bankr. E.D. Wis. 2010); *In re* McCully, 398 B.R 590, 593 (Bankr. N.D. Ohio 2008); *In re* Hall, No. 06-61733, 2008 WL 2388628, at *2 (Bankr. N.D. Ohio June 11, 2008); In re White, 411 .B.R. 268, 273 (Bankr. W.D.N.C. 2008); *In re* Hill, 386 B.R. 670, 676 (Bankr. S.D. Ohio 2008); *In re* Wetzel, 381 B.R. 247, 251 (Bankr. E.D. Wis. 2008); *In re* Young, 370 B.R. 799, 802 (Bankr. E.D. Wis. 2007); *In re* Ewers, 366 B.R 139, 142-43 (Bankr. D. Nev. 2007); *In re* McPike, No. 05-30518, 2007 WL 2317420, at *2 (Bankr. E.D. Wis. Aug. 8, 2007); Turek v. Dehart (*In re* Turek), 346 B.R. 350, 359 (Bankr. M.D. Pa. 2006); *In re* Drew, 325 B.R. 765, 773 (Bankr. N.D. Ill. 2005); *In re* Golek, 308 B.R. 332, 336-37 (Bankr. N.D. Ill. 2004); *In re* Sounakhene, 249 B.R. 801, 805 (Bankr. S.D. Cal. 2000); *In re* Coleman, 231 B.R 397, 401 (Bankr. S.D. Ga. 1999) (dictum); *In re* Anderson, 153 B.R. 527, 528 (Bankr. M.D. Tenn. 1993); *In re* Moss, 91 B.R. 563, 566 (Bankr. C.D. Cal. 1988).

[24]*See, e.g., Lorenzo*, 2014 WL 1877408, at *5; *Pautin*, 521 B.R. at 762; *Tibbs*, 478 B.R. at 464; *Grutsch*, 453 B.R. at 425; *Davis*, 439 B.R. at 867. Indeed one court reads the introductory language of § 1325(a) ("Except as provide in subsection (b)") as excluding § 1325(b) from the confirmation requirements under chapter 13. *See Sunahara*, 326 B.R. at 781.

Other courts have rejected this argument, noting that, if the trustee or the holder of an allowed unsecured claim objects to the plan, compliance with § 1325(b) is indeed a requirement for confirmation. *See, e.g., In re* Cormier, 468 B.R. 88, 96 (D. Mass. 2012); *In re* Heideker, 455 B.R. 263, 269-70 (Bankr. M.D. Fla. 2011).

[25]11 U.S.C. § 1325(b)(1) (emphasis supplied).

[26]*See, e.g., Lorenzo*, 2014 WL 1877408, at *5; *Powers*, 507 B.R. at 269; *Coay*, 2012 WL 2319100, at *5; *Davis*, 439 B.R. at 866. *But see In re* Anderson, Nos. 587-03218, 587-03236, 1989 WL 222971, at * 5 (Bankr. N.D. Cal. Sept. 8, 1989) (stating that "modification under Section 1329 requires . . . a new confirmation analysis" and that the proposed modifications must satisfy the requirements of Section 1325(b)).

ment period) were applicable to modifications, some courts have suggested that § 1329(a)(2) (which allows modifications to extend or reduce the time for payments under the plan) would be rendered meaningless.[27] Such a conclusion would violate the general precept of statutory interpretation that a provision should not be interpreted in a way that renders other provisions superfluous or unnecessary.[28]

Fifth, some courts maintain that since the 2005 amendments to the Code[29] it is technically impossible to apply § 1325(b)(1) to plan modifications because the section explicitly requires that, as of the effective date of the plan, the plan must provide for application 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 to pay unsecured creditors. "Disposable income" is defined in § 1325(b)(2) based on "current monthly income," a term defined by reference to income actually received prepetition.[30] Therefore, these courts posit that the term "disposable income" can never be increased to include postpetition income and, consequently, neither can the term "projected disposable income."[31]

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[27]*See, e.g., In re* Howell, No. 07-80365, 2007 WL 4124476, at *1 (Bankr. W.D. La. Nov. 19, 2007). *But see Williams*, 2014 WL 274307, at *7; *Cormier*, 478 B.R. at 96; *Heideker*, 455 B.R. at 270 (noting that even if above-median debtors could not modify their plans to reduce the applicable commitment period unless unsecured creditors were paid in full if § 1325(b) were applicable, below-median debtors who had previously confirmed plans of a duration longer than three years would be permitted under § 1329(a)(2) to modify the plans to reduce the length of the plan).

[28]*See, e.g.*, Ratzlaf v. United States, 114 S. Ct. 655, 659 (1994); Kungys v. United States, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion); South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 510 n.22 (1986).

[29]*See* discussion at notes 128-138 *infra*.

[30]11 U.S.C. § 101(10A) generally computes "current monthly income" based on the "average monthly income from all sources that the debtor receives . . . during the 6-month period ending on . . . the last day of the calendar month immediately preceding the date of the commencement of the case. . . ." *Id.* § 101(10A)(A)(i).

[31]*See In re* McAllister, 510 B.R. 409, 418 & n.12 (Bankr. N.D. Ga. 2014); *Powers*, 507 B.R. at 270; *In re* Hargis, No. 09-64398, 2013 WL 4514090, at *4 (Bankr. N.D. Ohio Aug. 23, 2013); *In re* Walker, No. 07-70358, 2010 WL 4259274, at * 9 (Bankr. C.D. Ill. Oct. 21, 2010); *In re* York, 415 B.R. 377, 382 (Bankr. W.D. Wis. 2009).

This analysis adopts a restrictive view of the Supreme Court's interpretation of the term "projected disposable income" in Hamilton v. Lanning, 560 U.S. 505 (2010). The Court there stated that "projected disposable income" must "account for changes in the debtor's income or expenses that are known or virtually certain *at the time of confirmation*." *Id.* at 524 (emphasis supplied). Although the facts of that case involved a debtor whose "disposable income" at the time of confirmation was substantially higher than his actual ability to pay, the Court suggested that its forward-looking approach was also applicable "[i]n cases in which a debtor's disposable income during the 6-month look-back period is either substantially lower or higher than the debtor's disposable income *during the plan period*." *Id.* at 520 (emphasis supplied). There is no reason to believe that the Court did not intend the forward-looking approach to be used in connection with a plan modification. Indeed, in *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 80 (2011), the Supreme Court indicated that "[t]he appropriate way to account for unanticipated expenses . . . is to use the method that the Code provides for all Chapter 13 debtors (and their creditors): modification of the plan in light of changed circumstances."). If such modifications are permitted for unanticipated expenses,

Finally, some courts state that, even if § 1325(b) could be read to apply to a modification to a chapter 13 plan proposed by the debtor (to which the trustee or the holder of an allowed unsecured claim could object as provided in § 1325(b)(1)), it cannot apply to a modification proposed by the trustee or unsecured creditors.[32] Of course, such a reading essentially makes § 1325(b) inapplicable to any modified plan that proposes increased payments, because such a proposal would rarely be made by a debtor.[33]

Instead of applying § 1325(b) to modified plans, many of those courts consider the amount the debtor is proposing to devote to unsecured creditors as a factor to be considered by the court in deciding whether to approve the

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they should also be allowed for unanticipated income. *See also In re* Peebles, 500 B.R. 270, 275 (Bankr. S.D. Ga. 2013) (stating that "[i]t is illogical and contrary to the plain language of § 1329 to suggest that a post-confirmation 'windfall' of any kind, which would presumably always be excluded from the new definition of disposable income, cannot support a modification by the trustee").

A related argument some courts make relies on the language of § 1325(b)(1)(B), which measures the beginning of the applicable commitment period for purposes of the disposable income test by the "date that the first payment is due under *the plan*." 11 U.S.C. § 1325(b)(1)(B) (emphasis supplied). Because a modified plan becomes "the plan" under § 1329(b)(2), these courts—relying on a comment made by Judge Lundin in his treatise, Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 255.1, at ¶ 14, Sec. Rev. June 15, 2004, www.Ch13online.com—conclude that applying the disposable income test would necessarily preclude any modification of a confirmed plan later than the date that is two years after the first date on which payments were due under the original confirmed plan. If the disposable income test applied to plan modifications, these courts argue, the debtor would be required to devote all disposable income for an "applicable commitment period" that begins "on the date that the first payment is due under the [modified] plan." Because the "applicable commitment period" under § 1325(b)(4) can never be shorter than three years, requiring compliance with the disposable income test upon plan modification would create an irreconcilable conflict between the limit on the length of a modified plan in § 1329(c) (no more than five years from "the time that the first payment under the original confirmed plan was due") and the the disposable income requirement in § 1325(b)(1)(B). Therefore, these courts conclude that Congress did not intend for modified plans to be subject to § 1325(b). *See, e.g.*, Forbes v. Forbes (*In re* Forbes), 215 B.R. 183, 192 (B.A.P. 8th Cir. 1997). Of course, if the reference to "the plan" in § 1325(b)(1)(B) is read to mean the original confirmed plan rather than the modified plan, there is no inconsistency between the two sections.

[32]*See, e.g.*, Max Recovery, Inc. v. Than (*In re* Than), 215 B.R. 430, 437 (B.A.P. 9th Cir. 1997); *Salpietro*, 492 B.R. at 638; *Davis*, 439 B.R. at 869-70; *In re* Braune, 385 B.R. 167, 171 (Bankr. N.D. Tex. 2008); *In re* Wetzel, 381 B.R. 247, 251 (Bankr. E.D. Wis. 2008); *In re* Forte, 341 B.R. 859, 864 (Bankr. N.D. Ill. 2005). *Cf. In re* DeFrehn, No. 02-20290, 2003 WL 25273838, at *5 n.8 (Bankr. D. Idaho June 13, 2003) (suggesting that, even if § 1325(b) is not applicable, modification requests by the trustee can be premised on additional disposable income); *In re* Fields, 269 B.R. 177, 180 (Bankr. S.D. Ohio 2001) (interpreting Sixth Circuit precedent to apply § 1325(b) to modifications proposed by the debtor, but stating that it is unclear whether § 1325(b) is applicable to trustee-proposed modifications). *But cf. In re* Louquet, 125 B.R. 267 (B.A.P. 9th Cir. 1991); *In re* Self, No. 06-40228, 2009 WL 2969489, at *7 (Bankr. D. Kan. Sept. 11, 2009) (rejecting argument that trustee cannot propose modification based on increased debtor income if trustee did not object to original confirmation of plan under § 1325(b)). *See generally* Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 255.1, at ¶ 5, Sec. Rev. June 15, 2004, www.Ch13online.com ("the courts should agree that the disposable income test *does not* apply when the proponent of the modification is the trustee or the holder of an allowed unsecured claim and the objecting party is the debtor") (emphasis in original).

[33]*See In re* Peebles, 500 B.R. 270, 276 (Bankr. S.D. Ga. 2013).

modified plan as having been proposed "in good faith" under § 1325(a)(3),[34] one of the requirements of § 1325(a) that are expressly applicable to plan modifications under § 1329(b)(1).[35]

Conversely, those courts that have held § 1325(b) applicable to chapter 13 plan modifications have generally relied on one or more of five arguments.[36] First, they note that the requirements of § 1325(a) are explicitly applicable to plan modifications, and § 1325(a) begins with the language "Except as provided in subsection (b)." Therefore, these courts conclude that the requirements of § 1325(b) are incorporated by reference into Section 1325(a) and are equally applicable to plan modifications.[37]

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[34]*See* note 7 *supra*.

[35]*Compare* Mattson v., Howe (*In re* Mattson), 468 B.R. 361, 374 (9th Cir. BAP 2012); Kinder v. Kingry (*In re* Kingry), No. 05-1126, 2006 WL 6810947, at *7 (9th Cir. BAP Mar. 16, 2006); Germeraad v. Powell, No. 14-3129, 2014 U.S. Dist. LEXIS 165920, at *17-18 (C.D. Ill. Oct. 27, 2014); *Pautin*, 521 B.R. at 763; In re Maxwell, No. 11-17873, 2013 WL 6000455, at *4 (Bankr. E.D. Cal. Nov. 8, 2013); *Grutsch*, 453 B.R. at 427; *In re* Kearney, 439 B.R. 694, 697-98 (Bankr. E.D. Wis. 2010); *In re* Savage, 426 B.R. 320 (Bankr. D. Minn. 2010); *In re* Leon, No. 09-16492, 2010 WL 9478874, at * 5 (Bankr. E.D. Cal. Oct. 4, 2010); *In re* Clevenger, 430 B.R. 539, 543 (Bankr. W.D. Mo. 2009); *In re* Brown, No. 05-49114, 2009 WL 565032, at *4 (Bankr. E.D. Tex. Mar. 5, 2009); *In re* Rither, No. 05-23558, 2008 Bankr. LEXIS 1278, at *6 (Bankr. E.D. Wis. Apr. 16, 2008) (denying motion to modify) *with* King v. Robenhorst, No. 11-573, 2011 WL 5877081, at *3 (E.D. Wis. Nov. 23, 2011); *In re* Pasley, 507 B.R 312 (Bankr. E.D. Cal. 2014); *Tibbs*, 478 B.R. at 465; *Davis*, 439 B.R. at 869; *In re* Riddle, 410 B.R. 460, 463-64 (Bankr N.D. Tex. 2009); *In re* Nunez, No. 08-21645, 2009 Bankr. LEXIS 308 (Bankr. C.D. Cal. Feb. 10, 2009); *In re* Knighton, No. 07-71560, 2008 WL 5644891, at * 2 (Bankr. N.D. Ill. Nov. 14, 2008); *In re* McPike, No. 05-30518, 2007 WL 2317420, at *2 (Bankr. E.D. Wis. Aug. 8, 2007); *In re* Awua, No. 96-10613, 1997 WL 1524800, at *5 (Bankr. E.D. Va. Feb. 24, 1997) (finding modified plan satisfied "good faith" requirement). *Cf. In re* Midgley, 413 B.R. 820 (Bankr. D. Or. 2009) (considering increase in disposable income as one of many factors in ruling on modification motion). *See generally* BANKRUPTCY LAW MANUAL § 13:50 (5th ed. rev. Dec. 2014) ("As to the requirement of submission of projected disposable income, the consensus is that the means test definition of disposable income does not govern a modification but that the good faith requirement should be applied to prevent overreaching by any party in connection with a modification"); David Gray Carlson, *Modified Plans of Reorganization and the Basic Chapter 13 Bargain*, 83 AM. BANKR. L.J. 585, 616 (Fall 2009) (suggesting that "where § 1325(b)(1) does *not* apply, good faith means what it meant before 1984—application of all disposable income to the plan. This is the principle that binds the debtor to surrender all surplus income in modifications.") (emphasis in original).

Use of the "good faith" requirement to impose a minimum payment requirement in connection with plan modifications has been strongly criticized by other courts. *See, e.g., In re* Cormier, 478 B.R. 88, 96 (Bankr. D. Mass. 2012); *Heidek*er, 455 B.R. at 272; *In re* Keller, 329 B.R. 697, 702-03 (Bankr. E.D. Cal. 2005).

[36]*See also In re* Heyward, 386 B.R. 919, 922 (Bankr. S.D. Ga. 2008); *In re* Carey, No. 02-75502, 2004 WL 3623505, at *3 (Bankr. N.D. Ill. Nov. 2, 2004); *In re* Solis, 172 B.R. 530, 532 (Bankr. S.D.N.Y. 1994); *In re* Flaming, No. 02-03680, 2003 WL 22848925, at *4 (Bankr. D. Idaho Nov. 10, 2003) (not specifying reason for finding Section 1325(b) application to plan modifications). *See generally* Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 255.1, at ¶ 5, Sec. Rev. June 15, 2004, www.Ch13online.com (stating that the "majority of reported decisions apply the disposable income test at modification of a confirmed plan, though many do so without comment or analysis").

[37]*See, e.g.*, Meyer v. Tucker (In re Tucker), No. 97-50268, 1997 WL 792979, at *1 (N.D. Ill. Dec. 23, 1997); *In re* Williams, No. 09-42400, 2014 WL 274307, at *6 (Bankr. D.N.J. Jan. 24, 2014); *In re* Carreiro, No. 11-17863, 2013 WL 2353784, at *3 (Bankr. M.D. Fla. May 30, 2013); *Cormier*, 478 B.R. at 95; *In re* Heideker, 455 B.R. 263, 269 (Bankr. M.D. Fla. 2011); *In re* Buck, 443 B.R. 463, 469 (Bankr. N.D. Ga.

Second, apart from the introductory language to § 1325(a), § 1325(a)(1) expressly requires that a chapter 13 plan "complies with the *provisions of this chapter* and with the other applicable provisions of this title."[38] Because § 1325(b) is without question a "provision of chapter 13," a modified plan must comply with that provision by reason of the applicability of § 1325(a)(1).[39]

Third, because § 1329(c)[40]—which is undoubtedly applicable to plan modifications—uses the term "applicable commitment period" (defined in §1325(b)(4)), some courts conclude that Congress must have intended that § 1325(b) be applicable to modified chapter 13 plans insofar as it imposes a durational requirement on chapter 13 plans.[41]

Fourth, courts note that under § 1329(a), the trustee and a holder of an allowed unsecured claim are explicitly permitted to seek modification of the confirmed chapter 13 plan. Moreover, § 521(f) requires individual debtors to file with the court copies of federal income tax returns at the request of the

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2010); *In re* King, 439 B.R. 129, 134 (Bankr. S.D. Ill. 2010); *In re* Baxter, 374 B.R. 292, 296 (Bankr. M.D. Ala. 2007); *In re* Keller, 329 B.R. 697, 702 (Bankr. E.D. Cal. 2005); *In re* Garver, No. 01-71333, 2004 Bankr. LEXIS 2195, at *6 (Bankr. N.D. Ill. Feb. 20, 2004); *DeFrehn*, No. 02-20290, 2003 WL 25273838, at * 5 & n.7; *In re* Martin, 232 B.R. 29, 36 (Bankr. D. Mass. 1999); *In re* McKinney, 191 B.R. 866, 869 (Bankr. D. Or. 1996).

Some courts that disagree note that § 1322(b) begins with the phrase "subject to subsections (a) and (c) of this section," 11 U.S.C. § 1322(b), but § 1329(b)(1) expressly mentions both § 1322(a) and § 1322(b), suggesting that Congress was not relying on introductory cross-references to incorporate substantive provisions. *See In re* Tibbs, 478 B.R. 458, 464 (Bankr. S.D. Fla. 2012); *In re* Hall, No. 06-61733, 2008 WL 2388628, at *2 (Bankr. N.D. Ohio June 11, 2008); *In re* Hill, 386 B.R. 670, 676 (Bankr. S.D. Ohio 2008).

[38]11 U.S.C. § 1325(a)(1) (emphasis supplied).

[39]*See, e.g., In re* Stretcher, 466, B.R. 891, 894 (Bankr. W.D Tex. 2011); *Buck*, 443 B.R. at 469; *King*, 439 B.R. at 135; *In re* Quinn, 423 B.R. 454, 465-66 (Bankr. D. Del. 2009); *Braune*, 385 B.R. at 670; *Baxter*, 374 B.R. at 296; *Garver*, 2004 Bankr. LEXIS 2195, at *6; *Martin*, 232 B.R. at 36; *In re* Klus, 173 B.R. 51, 58 & n.10 (Bankr. D. Conn. 1994); *In re* Powers, 140 B.R. 476, 480 & n.5 (Bankr. N.D. Ill. 1992).

Those courts that disagree with this analysis argue that interpreting § 1325(a)(1) to make applicable § 1325(b) renders most of § 1329(b)(1) superfluous, because the requirement that the modified plan satisfy the requirements of § 1325(a)(1) (which requires that the plan comply with the provisions of chapter 13) would already pick up §§ 1322(a), 1322(b) and 1323(c) which are explicitly referenced in § 1329(b)(1). *See, e.g.*, Lorenzo, 2014 WL 1877408, at *6; *Powers*, 507 B.R. at 269; *Coay*, 2012 WL 2319100, at *5; *Grutsch*, 453 B.R. at 425; *Davis*, 439 B.R. at 867-68; *King*, 439 B.R. at 135; *Hill*, 386 B.R. at 675; *Forbes*, 215 B.R. at 191.

[40]11 U.S.C. § 1329(c) states that a modified plan "may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time."

[41]*See* Danielson v. Flores (*In re* Flores), 735 F.3d 855, 859-60 (9th Cir. 2013) (dictum in case holding that confirmed plan must satisfy applicable commitment period even if debtor has no projected disposable income); *Buck*, 443 B.R. at 469; *King*, 439 B.R. at 134. Other courts have found the inclusion of the reference to applicable commitment periods (as defined in § 1325(b)) in § 1329(c) evidence that Congress intentionally excluded § 1325(b) from other subsections of § 1329. *See, e.g., Grutsch*, 453 B.R. at 425.

court, the United States trustee or any party in interest.[42] These provisions indicate that Congress intended to permit the trustee and unsecured creditors to seek upward adjustments of plan payments when projected disposable income of the debtor increased, a goal that would be frustrated by a conclusion that the provisions of § 1325(b) were not applicable to plan modifications.[43]

Finally, courts finding § 1325(b) applicable to chapter 13 plan modifications have concluded that it would be absurd to require a chapter 13 debtor to propose and confirm a plan that is required to comply with § 1325(b), and then allow the same debtor to turn around and propose to modify that confirmed plan in a way that does not comply with § 1325(b).[44] In other words, although the actual amount of projected disposable income may change, the requirement that all projected disposable income to be received by the debtor in the applicable commitment period is one that cannot be modified.[45] Otherwise, a debtor could do indirectly what it could not do directly—propose a chapter 13 plan that does not meet the disposable income test—and would thereby contravene both statutory language and the intent of Congress in enacting that test.

Although statutory language is generally determinative in interpreting a statute,[46] where that language is ambiguous, or leads to absurd results, it is appropriate to look at the legislative history to aid in interpretation.[47] The conflicting interpretations of § 1329 necessarily demonstrate the absence of clear statutory language and, therefore, invite a review of the legislative history of §§ 1325(b) and 1329 by the courts in their determination of whether Congress intended § 1325(b) to apply to chapter 13 plan modifications.

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[42]11 U.S.C. § 521(f).

[43]*See, e.g.*, Barbosa v. Solomon, 235 F.3d 31, 40-41 (1st Cir. 2000); *Williams*, 2014 WL 274307, at *7; *Cormier*, 478 B.R. at 97; *Heideker*, 455 B.R. at 270-71; *King*, 439 B.R. at 136; *In re* Self, No. 06-40228, 2009 WL 2969489, at *5 (Bankr. D. Kan. Sept. 11, 2009).

[44]*See, e.g.*, *Cormier*, 478 B.R. at 97; *Heideker*, 455 B.R. at 271; *In re* Rhymaun, No. 11-20092, 2011 WL 9378787, at *3 n.8 (Bankr. S.D. Fla. Aug. 8, 2011); *King*, 439 B.R. at 135; *In re* Demske, 372 B.R. 85, 88 (Bankr. M.D. Fla. 2007); *In re* Nahat, 315 B.R. 368, 377 & n.15 (Bankr. N.D. Tex. 2004). Courts that conclude § 1325(b) is not applicable to modifications believe that an effort to circumvent the projected disposable income test through modification would be rejected as failing the "good faith" test of § 1325(a)(3). *See, e.g.*, Neidich v. Lorenzo (*In re* Lorenzo), No. 13-23100, 2014 WL 1877408, at *4 (S.D. Fla. May 9, 2014); *In re* Fridley, 380 B.R. 538, 543 (B.A.P. 9th Cir. 2007); *In re* Hall, No. 06-61733, 2008 WL 2388628, at *3 (Bankr. N.D. Ohio June 11, 2008).

[45]*Demske*, 372 B.R. at 88 & n.3.

[46]*See* Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004); Hartford Underwriters Ins. Co. v Union Planters Bank, N.A., 530 U.S. 1, 6 (2000); U.S. v. Ron Pair Enters., Inc. 489 U.S. 235, 242 (1988).

[47]*See, e.g.*, Wilson v. Comm'r, 705 F.3d 980 (9th Cir. 2013); Limited, Inc. v. C.I.R., 286 F.3d 324, 332 (6th Cir. 2002).

II. STATUTORY LANGUAGE AND LEGISLATIVE HISTORY—ORIGINAL INTENT AND UNINTENDED CONSEQUENCES

Chapter 13 was included in the 1978 Code in order to provide an alternative to a chapter 7 liquidation that would allow debtors to repay more of their debts over several years than creditors would receive from the debtors' non-exempt property surrendered to a trustee.[48] However, the new provisions required the court to confirm a chapter 13 plan if it provided for distributions to unsecured creditors with a present value not less than the amount that would have been paid such creditors under a chapter 7 liquidation on the effective date of the plan (that is, if the plan met the so-called "best interests test").[49] Because most chapter 7 debtors had few, if any, nonexempt assets that could be liquidated to pay unsecured creditors, no distributions under a chapter 13 plan were necessary to meet the best interests test. Therefore, debtors proposed such "no distribution" chapter 13 plans and their creditors would receive no additional payments on account of their claims. Some bankruptcy courts[50] considered such plans not to be proposed "in good faith" and, therefore, not confirmable under § 1325(a)(3).[51] However, most appellate courts found no basis in the statutory language of § 1325 for requiring any minimum payment out of future earnings of chapter 13 debtors in excess of those payments required by the best interests test.[52]

Because of creditor dissatisfaction with the ineffectiveness of chapter 13 in encouraging greater payments on unsecured claims than required by the best interests test, and the confusion over whether "no distribution" plans were confirmable, Congress began to consider various methods of modifying chapter 13 to impose a higher burden for confirmation. The earliest proposal was introduced by the Senate Judiciary Committee as an amendment to a bill, S. 658, that was intended merely to make technical amendments to the recently-enacted Code and proposed no substantive changes to § 1325.[53] The

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[48]*See, e.g.*, H.R. REP. No. 595, 95th Cong., 1st Sess. 118, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6079.

[49]*See* Section 1325(a)(4), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978) (requiring that "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date").

[50]*See, e.g.*, Tenney v. Terry (*In re* Terry), 630 F.2d 634 (8th Cir. 1980); *In re* Hurdle, 11 B.R. 304 (Bankr. E.D. Va. 1981); *In re* Dant, 9 B.R. 117 (Bankr. E.D. Va. 1981); *In re* Aalto, 8 B.R. 157 (Bankr. M.D. Fla. 1981); *In re* Heard, 6 B.R. 876 (Bankr. W.D. Ky. 1980); *In re* Cook, 3 B.R. 480 (Bankr. S.D. W. Va. 1980); *In re* Cole, 3 B.R. 346 (Bankr. SD. W. Va. 1980); *In re* Iacovoni, 2 B.R. 256 (Bankr. D. Utah 1980).

[51]Section 1325(a)(3), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978) required that "the plan has been proposed in good faith and not by any means forbidden by law" in order to be confirmed.

[52]*See, e.g.*, U.S. v. Estus (*In re* Estus), 695 F.2d 311 (8th Cir. 1982); Deans v. O'Donnell, 692 F.2d 968 (4th Cir. 1982); Goeb v. Heid (*In re* Goeb), 675 F.2d 1386 (9th Cir. 1982).

[53]S. 658, 96th Cong., 2nd Sess. (Mar. 14, 1979).

new provision proposed to amend § 1325(a)(3) to require not only that a chapter 13 plan be proposed in good faith, but also that it "is the debtor's best effort."[54] The Senate Report provides that the new language was intended to make "clear that the court should determine that the payments in the plan proposed by the debtor are the greatest that the debtor can reasonably pay so that the liberal provisions allowing composition plans in Chapter 13 will not be abused by debtors."[55] This "best effort" formulation was borrowed from the language of Section 727(a)(9).[56] The amended bill passed the Senate[57] and moved to the House where it was referred to the House Judiciary Committee.

When the bill emerged from the House Judiciary committee, the language of the proposed amendment to § 1325(a)(3) required that a chapter 13 plan "represent[ ] the debtor's good faith effort" as a condition to confirmation.[58] The House Report described the amendment as follows:[59]

> This amendment clarifies that the character of performance by the debtor envisioned by a chapter 13 proceeding is that the plan will provide payments to creditors consistent with the debtor's ability after account is taken of monthly budgeted personal and family needs. This provision will require the court to determine . . . that the proposed plan contemplates a "good-faith" effort by the debtor in terms of the promised future payments as measured by the ability of the debtor to make such payments.
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> * * *
>
> The "good-faith effort" test incorporates as a separate prerequisite to the confirmation of a chapter 13 plan the requirement that the aggregate payments proposed under the plan represent a good-faith effort on the part of the debtor to satisfy the claims of creditors during the pendency of the plan consistent with the ability of the debtor to make payments under a chapter 13 plan. In short, the "good-faith ef-

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[54]S. 658, § 188, 96th Cong., 2nd Sess. (reported out of Senate Committee on the Judiciary on August 3, 1979 (legislative day June 21, 1979)).

[55]S. REP. NO. 305, 96th Cong., 2nd Sess. 14 (August 3, 1979 (legislative day June 21, 1979)).

[56]*Id.* Section 727(a)(9)(B) allows a chapter 13 debtor to obtain a discharge without paying all of his or her allowed unsecured claims if the debtor pays at least seventy percent of those claims and "the plan was proposed by the debtor in good faith, and was the debtor's best effort").

[57]*See* CONG. REC. S12172-12187 (Sept. 7, 1979).

[58]S. 658, § 128(b), 96th Cong., 1st Sess. (reported out of House Committee on the Judiciary on July 25, 1980).

[59]H.R. REP. NO. 1195, 96th Cong., 2nd Sess. 24 (July 25, 1980).

> fort" test looks to the present and future ability of the debtor to make payments into the chapter 13 creditors' fund during the course of the plan . . . .

The House approved the revised version of the bill,[60] and thereafter the Senate approved the revised version, with some additional amendments, including one which changed the proposed "good faith" amendment to § 1325(a)(3) to one inserted in § 1325(a)(4), requiring that the plan represent the debtor's "bona fide effort."[61] In discussing the Senate modification, Senator DeConcini (Chair of the Senate Judiciary Committee) noted that the new language was attempting to create a compromise between the "good faith" test of the House and the "best efforts" test of the Senate.[62] He described the new "bona fide" standard as requiring "not only a sincere good faith effort by the debtor but also one that proposes payments to the creditors that represent a significant percentage if not all of the debts owed."[63] Elaborating on the policy underlying the new requirement, Sen. DeConcini continued as follows:

> The "bona fide effort" requirement is responsive to the widespread concern amount creditors and judges alike that the provisions of Chapter 13 as enacted inadvertently permitted plans to be confirmed that proposed little or no payments to unsecured creditors. This is contrary to the historical spirit and intent of Chapter 13 which was to afford the debtor the protection of the bankruptcy court while the debtor worked out a plan to repay his creditors over a period of years out of his future earnings. Thus, Chapter 13 is a remedy for the individual with cash-flow problems while Chapter 7 would be available for the debtor who simply had no present or foreseeable prospects of paying his debts at all.
>
> Under the new law, too often instead of meaningful payments to unsecured creditors, the norm has become "zero" or nominal payment plans in many jurisdictions. In other areas, judges have had to strain the provisions of Section 1325 by decision or informal rule to reach the right result vis-à-vis the level of payments of the debtor for the particular case.
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> Many courts have construed the good-faith language,

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[60]*See* CONG. REC. H9290-9306 (Sept. 22, 1980).

[61]*See* S. 658, § 128(b), CONG. REC. S15170 (Dec. 1, 1980).

[62]*See* CONG. REC. S15175 (Dec. 1, 1980).

[63]*Id.*

> Section 1325(a)(3) to this end, which was not intended by Congress in the enactment of that requirement. . . .[64]

The House approved the revised version of the bill, but made further changes (none of which changed the "bona fide effort" standard).[65] The Senate then reintroduced the bill reflecting the version recently passed by the House with some additional amendments (again, none of which changed the "bona fide effort" standard for chapter 13 confirmations)[66] and passed its revised version.[67] The legislative session expired without the House taking action on the revised bill.

Early in the next legislative session, a new bill was introduced in the Senate, identical to the version that died in the last session and including the "bona fide effort" standard in a proposed amendment to § 1325(a)(4).[68] The Senate Judiciary Committee issued a new report on the bill,[69] including the identical language to describe the proposed amendments to § 1325(a)(4) used by Senator DeConcini when introducing the Committee's final amendments to S. 658 on the Senate floor the prior year.[70] An amended version of the bill again passed the Senate.[71]

Meanwhile, bills were introduced in both the Senate[72] and House of Representatives[73] that proposed to modify § 1325(a) in two ways. First, a confirmed plan would have to represent the debtor's "bona fide effort which is consistent with the debtor's ability to repay his debts, after providing support for himself and his dependents."[74] Second, the bills proposed to insert a new requirement for confirmation that the chapter 13 plan either extend for a period of five years or provide for payment of at least seventy percent of all allowed unsecured claims.[75] A subsequent bill introduced in the Senate[76] by Senator Dole also endorsed the modified "bona fide effort" amendment to Section 1325(a)(3),[77] but his proposed new version of Section 1325(a)(6) would require that the plan extend for five years or provide "for payments of

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[64]*Id.*

[65]*See* S. 658, § 127(a), CONG. REC. H11735 (Dec. 3, 1980).

[66]S. 3259, 96th Cong., 2nd Sess. (Dec. 9, 1980 (legislative day Nov. 20, 1980)).

[67]*See* CONG. REC. S15943-45 (Dec. 9, 1980 (legislative day Nov. 20, 1980)).

[68]S. 863, 97th Cong., 1st Sess. (Apr. 2, 1981 (legislative day Feb. 16, 1981)).

[69]S. REP. NO. 150, 97th Cong., 1st Sess. (July 10, 1981 (legislative day July 8, 1981)).

[70]*Id.* at 18. *See* text at note 64 *supra.*

[71]CONG. REC. S7893-7907 (July 17, 1981).

[72]S. 992, 97th Cong., 1st Sess. (Apr. 10, 1981 (legislative day, Feb. 16, 1981)).

[73]H.R. 4786, 97th Cong., 1st Sess. (Oct. 20, 1981).

[74]H.R. 4786, § 19(a), proposed inserting the "bona fide effort" test in § 1325(a)(3). S. 992, § 3(a), did not specify in which subsection of § 1325(a) the insertion was to be made.

[75]S. 992, at § 3(b)(2); H.R. 4786, at § 19(4).

[76]S. 2000, 97th Cong., 1st Sess. (Dec. 16, 1981 (legislative day, Nov. 30, 1981)).

[77]*Id.* at § 18(a).

a reasonable portion of all allowed unsecured claims."[78] An amended version of this latter bill was reported out of the Senate Judiciary Committee with the language on chapter 13 plan confirmation unchanged from the original bill.[79] In describing the need for the new provisions, the Committee stated:

> A chapter 13 proceeding involves substantial benefits to the debtor who is able to retain his property, avoid most nondischargeable debts, and cram down debts of secured creditors. The quid pro quo for such benefits would seem to be a substantial effort by the debtor to pay his debts. Of course, the first criterion in such cases must be the debtor's obligations to support himself and his family. But beyond that, it is necessary to have a definite standard delineating how much of the debtor's future income should be committed to the plan.
>
> * * *
>
> It is the intent of Congress to require the debtor to make a substantial effort to pay his debts. Such an effort may require sacrifices and some reduction in consumption. Thus, subsection (a) of the amendment, which adds new language to subparagraph 1325(a)(3), requires the debtor to devote that portion of his income which is not necessary for the support the debtor and his family to the plan. . . .
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> * * *
>
> Finally, the amendment (in subsection (d)) would require the plan to last for a period of 5 years, or to pay a reasonable portion of allowed unsecured claims. What a reasonable portion of allowed unsecured claims is will be determined on a case-by-case basis . . . . In general, and excluding hardship circumstances, a debtor should contemplate the repayment of at least 70 percent of the allowed unsecured claims for a proposed plan that has a duration of no more than 3 years, unless the repayment of that percentage of such claims would be unfeasible even if the plan were to extend over a greater period of time.[80]

Meanwhile, the Subcommittee on Monopolies and Commercial Law of

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[78]*Id.* at § 18(d).

[79]S. REP. No. 446, 97th Cong., 2nd Sess. (May 27, 1981 (legislative day May 25, 1981)).

[80]*Id.* at 32, 46.

the Committee on the Judiciary of the House of Representatives was holding oversight hearings on the operation of chapter 13 in October 1981 and March—June 1982. The first witness before the Subcommittee was Prof. Vern Countryman of Harvard Law School, who spoke in his capacity as Vice Chairman of the National Bankruptcy Conference.[81] Professor Countryman addressed several proposals to amend the provisions of chapter 13, including those aimed at preventing no-distribution plans.[82] He agreed with those legislators who had opined that the requirement for confirmation that a plan be proposed "in good faith"[83] was not intended to impose a quantitative test on distributions. However, he found the proposed "bona fide effort" test to be "vague[ ]" and likely to engender "confusion."[84] He further criticized those bills that would add a new confirmation requirement that every plan either pay at least 70 percent to unsecured creditors or have a five-year duration.[85]

Instead, Professor Countryman offered a proposal from the National Bankruptcy Conference that would accomplish two goals. First, it would impose a new condition to confirmation of a chapter 13 plan that could be invoked by any unsecured creditor, forcing the debtor to devote all of his or her projected disposable income to the plan.[86] The statutory language submitted by the National Bankruptcy Conference in this regard would add a new clause (c) to Section 1325 as follows:

> (c) Notwithstanding subsection (a) of this section, the court may not confirm a plan over a timely objection by the holder of an allowed unsecured claim, unless the payments to be made under the plan total at least
>
> (1) an amount equal to 100 percent of allowed claims; or
>
> (2) the debtor's total projected disposable income
>
> during the three-year period commencing on the date the debtor's first payment under the plan is due.
>
> (d) The court may not deny confirmation of a plan under subsection (a)(3) of this section on a ground relating to the amount of the payments to be made under the plan.[87]

The proposed statutory language would also include a definition for "disposable income" in a new § 1320 as "all earnings and other income not rea-

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[81]Oversight Hearings before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 97th Cong., 1st and 2nd Sess., on Personal Bankruptcy (Oct. 22, 1981; March 23, 25, Apr. 28, May 20, and June 16, 1982), at 2.

[82]*Id.* at 6.

[83]11 U.S.C. § 1325(a)(3).

[84]Oversight Hearings, at 6.

[85]*Id.*

[86]*Id.*

[87]*Id.* at 29.

sonably necessary (a) for the support of the debtor and any dependent of the debtor and, (b) if the debtor is engaged in business, for payment of actual expenses incurred in operating the business."[88]

The second goal of the National Bankruptcy Conference proposal was to ensure that plans could be modified to reflect subsequent changes in the debtor's income, whether favorable or unfavorable, which may result in "an inadequate commitment of his disposable income under the plan."[89] It was the view of the National Bankruptcy Conference that, "in exchange for the advantages of chapter 13 over chapter 7, the debtor should commit this disposable income for the term of the plan."[90] Therefore Professor Countryman submitted proposed language that:

> will permit the debtor to seek a modification of the plan, in the event of a reduction in income, but it will also permit an unsecured creditor, in the event of an improvement in the debtor's income position at any time during the period of the plan, to seek a modification *so that the full amount of the debtor's disposable income as it then is, remains committed to payments under the plan.*[91]

This goal would be accomplished by adding a new paragraph (d) to § 1329 which would read as follows:

> (d) On request of the debtor or of a creditor holding an allowed unsecured claim and after notice and a hearing, the plan shall be modified under subsection (a) of this section to any extent that any change in the debtor's total projected disposable income, as defined in section 1320 of this title, substantially affects whether the plan, before modification, complies with the conditions specified in sections 1325(a)(6) and 1325(c) of this title.[92]

Bankruptcy Judge Conrad K. Cyr of the District of Maine, Chair of the Committee on Chapter 13 of the National Bankruptcy Conference, also testified in support of the proposal.[93] Judge Cyr emphasized that the second objective of the proposal was to make the "ability-to-pay standard . . . applicable to plan modifications following confirmation . . . ."[94]

Soon after the oversight hearings were concluded, Congress was attempt-

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[88] *Id.* at 27.
[89] *Id.* at 7.
[90] *Id.*
[91] *Id.* (emphasis supplied).
[92] *Id.* at 31.
[93] *Id.* at 181.
[94] *Id.* at 215.

ing to enact revisions to the Code in response to the Supreme Court's decision in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.[95] finding unconstitutional the provisions of the Code that conferred Article III jurisdiction on non-Article III bankruptcy judges. In one of the bills proposed to address that issue, Representative Butler included the proposals of the National Bankruptcy Conference with respect to ability-to-pay under chapter 13.[96] The bill proposed to insert language at the beginning of § 1325(a) that states, "Except as provided in subsection (b)," redesignate the current subsection (b) as subsection (c), and enact a new subsection (b) that included both the projected disposable income test proposed by the National Bankruptcy Conference, and the definition of "disposable income," as follows:

> (b)(1) If the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan be applied to make payments under the plan.
>
> (2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended—
>
> (A) for the support of the debtor or a dependent of the debtor; or
>
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of the business.[97]

The bill also proposed amending § 1329 on postconfirmation modifications to add a new subsection (b) which was substantively the same as that proposed by the National Bankruptcy Conference:

> (b)(1) At any time after confirmation, but before the completion of payments under the plan, the plan shall be modified, at the request of the holder of an allowed unsecured claim, and after notice and a hearing, to the extent that any change in the debtor's anticipated disposable in-

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[95]458 U.S. 50 (1982).

[96]H.R. 7294, 97th Cong., 2d Sess. (Oct. 1, 1982).

[97]*Id.* at § 315.

> come causes the plan to fail to satisfy both of the requirements specified in subparagraphs (A) and (B) of section 1325(b)(1) of this title. The plan as modified becomes the plan.
>
> (2) In paragraph (1) of this subsection, "disposable income" shall have the meaning given it in section 1325(b)(2) of this title.[98]

If adopted, § 1329(a) would have remained the provision pursuant to which a debtor could seek modification of a confirmed plan,[99] and the language of § 1329(b)(1) would become a new § 1329(c) and would apply to modifications sought both by debtors and unsecured creditors.[100] Representative Butler introduced a revised version of his bill two months later[101] in which the ability-to-pay proposal was modified by removing the definition of "disposable income" from § 1325(b) and by requiring that the disposable income test be met if any "party in interest" (not just a holder of an unsecured claim) objected to confirmation of the chapter 13 plan.[102] The proposed amendments to § 1329 did not change, other than the deletion of the former reference to the definition of "disposable income" in § 1325(b)(2).[103] Both bills died at the end of the legislative session without any action being taken on them.

Early in the new session, Representative Rodino, the Chair of both the House Committee on the Judiciary and its Subcommittee on Monopolies and Commercial Law, introduced a new bill in the House, and Senators Metzenbaum and Kennedy introduced an identical bill in the Senate, which closely

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[98]*Id.* at § 316(d).

[99]*Id.* at § 316(a).

[100]*Id.* at § 316(c).

[101]H.R. 7349, 97th Cong., 2d Sess. (Dec. 2, 1982).

[102]*Id.* at § 315.

[103]Id. at § 316. Although there is no way to determine why the definition of "disposable income" was deleted, both H.R. 7294 and H.R. 7349 included a new definition of "anticipated disposable income" to be inserted in § 101 which would read as follows:

> (3) "anticipated disposable income" means—
>
> (A) income that the debtor has, at the time of the commencement of the case, a reasonable expectation of receiving for the foreseeable future; less
>
> (B) expenditures that, at the time of the commencement of the case, are reasonably necessary to support the debtor and the debtor's dependents, and to operate any business of the debtor;

Perhaps in making the revisions included in H.R. 7349, someone erroneously believed that the definition of "disposable income" in § 1325(b) was unnecessary in light of the definition of "anticipated disposable income" that was already included. However, the proposed language of § 1325(b) and § 1329 did not use the term "anticipated disposable income," nor would that term (which is determined as of the commencement of the case) be appropriate in those contexts.

tracked the proposal of the National Bankruptcy Conference.[104] Unlike the revised bill of Representative Butler, these bills restored the definition of "disposable income" in § 1325(b), and allowed only holders of allowed unsecured claims to trigger application of the disposable income test by objecting to the plan.[105] Both bills also proposed to insert a new subparagraph (d) in § 1329 that would read as follows:

> (d) On request of the debtor, the trustee, or a creditor holding an allowed unsecured claim and after notice and a hearing, the plan shall be modified under subsection (a) of this section to any extent that any change in the debtor's anticipated disposable income substantially affects whether the plan, before modification, complies with the requirements specified in section 1325(a)(6) and section 1325(b) of this title.[106]

Shortly thereafter, Senator Dole introduced another bill which followed the approach in the bill he had previously introduced in 1981[107] by seeking to amend § 1325(a)(3) to require that a chapter 13 plan "represent[ ] a bona fide effort which is consistent with the debtor's ability to repay his debts, after providing support for himself and his dependents"[108] and insert a new § 1325(a)(6) which would preclude confirmation of a chapter 13 plan unless they either had a duration of five years or "provide[ ] for payments of a reasonable portion of all allowed unsecured claims."[109] The bill also proposed an amendment to § 1325(a)(4) to require that a chapter 13 plan "presents the debtor's bona fide effort,"[110] although that provision was struck before the bill emerged from the Senate Judiciary Committee.[111] The Senate Report accompanying the bill[112] contained identical language describing the proposed amendments to § 1325(a) as that included in the Senate Report accompany-

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[104]H.R. 1147, 98th Cong., 1st Sess. (Feb. 1, 1983); S. 333, 98th Cong., 1st Sess. (Feb. 1, 1983 (legislative day Jan. 25, 1983)).

[105]H.R. 1147 at § 10; S. 333 at § 10.

[106]H.R. 1147 at §12; S. 333 at § 12.

[107]S. 2000, 97th Cong., 1st Sess. §19 (Dec 16, 1981 (legislative day Nov. 30, 1981)).

[108]S. 445, 98th Cong., 1st Sess. §220 (Feb. 3, 1983 (legislative day Jan. 25, 1983)).

[109]*Id.* § 220. The word "payments" was changed to "payment" in the Senate Judiciary Committee. A bill with identical language for proposed amendments to § 1325(a) was introduced in the House a month later. H.R. 1800, 98th Cong., 1st Sess. § 120 (March 2, 1983). Two other bills were introduced in the House during the same period, both of which proposed the same amendment to § 1325(a)(3) as S. 445, but requiring that a chapter 13 plan either have a duration of five years or provide "for payments of at least 70 per centum of all allowed unsecured claims." H.R. 1169, 98th Cong., 1st Sess. § 19 (Feb. 2, 1983); H.R. 3205, 98th Cong., 1st Sess. § 19 (June 2, 1983).

[110]*Id.* §430(b).

[111]S. 445, 98th Cong., 1st Sess. § 430 (April 26, 1983)

[112]S. Rept. No. 98-65, 98th Cong., 1st Sess. § 220 (April 26, 1983).

ing the 1981 bill.[113] The bill passed the Senate on April 27, 1983,[114] and thereafter was referred to the House Judiciary Committee and the House Committee on Post Office and Civil Service.[115]

While the Senate was considering the Dole bill, the House of Representatives deadlocked over the *Marathon* problem, unable to reach a compromise between those who sought Article III status for bankruptcy judges and those who were opposed to that approach. Representative Rodino introduced a bill that coupled giving bankruptcy judges Article III status with provisions that might induce opponents to that approach to accept a compromise, including changes to the requirements for a chapter 13 plan. Under H.R. 5174,[116] § 1325(a) would be amended to insert that language "Except as provided in subsection (b)" at the beginning of the subsection and a new subsection (b) would be adopted that would read as follows:

> (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.
>
> (2) For purposes of this subsection, 'disposable income' means income which is received by the debtor and which is not reasonably necessary to be expended—
>
> (A) for the maintenance or support of the debtor or a dependent of the debtor; or
>
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business."[117]

With only very minor changes, this language is identical to that included in the bill introduced by Representative Butler shortly after the conclusion of the oversight hearings.[118] However, instead of inserting a new subsection to

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[113]*See* text at note 80 *supra.*

[114]129 CONG. REC. S5383-88 (April 27, 1983).

[115]S. 445, 98th Cong., 1st Sess. (May 5, 1983).

[116]H.R. 5174, 98th Cong., 2nd Sess. (March 19, 1984).

[117]*Id.* at §217.

[118]*See* text at notes 96-100 *supra.*

permit holders of allowed unsecured claims to move to modify a confirmed chapter 13 plan, the bill proposed an amendment to the existing provisions of § 1329(a) to make clear that modifications of chapter 13 plans could be made "upon request of the debtor, the trustee, or the holder of an allowed unsecured claim."[119] No amendment to § 1329(b) was proposed as part of this new bill.

After approving an amendment to the bill to eliminate conferring Article III status on bankruptcy judges and instead adopting the approach already adopted by the Senate that would designate bankruptcy judges as "adjuncts" of the district court, the House passed the bill.[120] The Senate passed the bill with amendments,[121] none of which affected the provisions of § 1325 or § 1329. The Conference Committee resolved the remaining differences between House and Senate, but in that process made no changes to the language of the bill with respect to § 1325 or § 1329.[122] The Conference Report was approved by both House[123] and Senate,[124] and was signed into law by the President on July 10, 1984.[125]

Section 1325(b) was amended in a minor respect in 1986 to change the word "or" between the clauses of § 1325(b)(2)(A) and § 1325(b)(2)(B) to "and."[126] In 1998, Congress amended § 1325(b)(2)(A) to exclude from the term "disposable income" amounts reasonably necessary to be expended for certain charitable contributions.[127]

When Congress amended the Code in 2005,[128] it substantially rewrote § 1325. First, it added three new confirmation requirements for a chapter 13 plan, set forth in § 1325(a)(7), (8) and (9),[129] and significantly modified the required treatment of secured claims under a plan.[130] Second, in a section of the statute titled "Chapter 13 Plans to Have a 5-Year Duration in Certain Cases," it modified § 1322(d) (which had previously limited the duration of a chapter 13 plan to three years unless the court, for cause approved a longer

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[119]H.R. 5174, 98th Cong., 2nd Sess. § 219 (March 19, 1984).

[120]130 CONG. REC. H1796-1854 (March 21, 1984).

[121]130 CONG. REC. S7617-25 (June 19, 1984).

[122]Conf. Rept. No. 98-882, 98th Cong., 2nd Sess. 26-27 (June 29, 1984).

[123]130 CONG. REC. H7499-7500 (June 29, 1084).

[124]130 CONG. REC. S8887-8900 (June 29, 1984).

[125]Pub. L. No. 98-353 (July 10, 1984).

[126]Pub. L. No. 99-554, § 283(y) (Oct. 27, 1986), 100 Stat. 3118.

[127]Pub. L. No. 105-183, § 4(a) (June 19, 1998), 112 Stat. 518. Charitable contributions that qualify for exclusion from disposable income are those "that meet the definition of 'charitable contribution' under section 548(d)(3)" that are made "to a qualified religious or charitable entity or organization" and that do "not exceed 15 percent of gross income of the debtor for the year in which the contributions are made."

[128]Bankruptcy Amendments and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, Title I, § 102(h)(2) (Apr. 20, 2005), 119 Stat. 33.

[129]*Id.* § 102(g)(3), § 213(10), and § 716(a).

[130]*Id.* § 306.

period not to exceed five years[131]) and replaced the requirement in § 1325(b)(1)(B) that all the debtor's projected disposable income to be received in the *three-year period* beginning on the date that the first plan payment is due be devoted to paying unsecured claims with a requirement that all projected disposable income to be received in the *applicable commitment period* beginning on such date be so paid.[132] It also defined the term "applicable commitment period" (used in the newly-amended § 1325(b)(1)(B)) to mean either three years, or (if the debtor was an above-median debtor) five years, or less than those periods, but only if the plan "provides for payment in full of all allowed unsecured claims over a shorter period."[133]

Congress also changed the definition of "disposable income" so that the computation begins not with "income which is received by the debtor" but with "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)."[134] The term "current monthly income" was added as a new definition that generally looks to the average monthly income of the debtor for the six months ending on the last day of the calendar month preceding the bankruptcy filing.[135] Finally, in a section of the legislation that Congress labelled "Applicability of Means Test to Chapter 13," it specified that the portion of that income "reasonably necessary to be expended" for maintenance or support of the debtor or debtor's dependents and continuation, preservation and operation of a business within the meaning of § 1325(b)(2) was to be determined in accordance with the means-testing provisions of §§ 707(b)(2)(A) and (B) if the debtor was an above-median debtor.[136]

Section 1329(c) was modified in a consistent fashion, changing the language that previously limited a modified plan to three years to language that limited the duration of a modified play to "the applicable commitment period under § 1325(b)(1)(B)."[137] Section 1329(a) was also amended to permit mod-

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[131]Pub. L. No. 95-598, § 1322(c), 92 Stat. 2648 (Nov. 6, 1978).

[132]*Id.* § 318(2).

[133]*Id.* § 318(3).

[134]*Id.* § 318(2).

[135]11 U.S.C. § 101(10A).

[136]BAPCPA, § 102(h)(2). The test of whether a debtor is "above-median" is whether "the debtor has current monthly income, when multiplied by 12, greater than—(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner; (B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income for the applicable State for a family of the same number or fewer individuals; or (C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4." *Id.* The $525 figure is subject to adjustment every three years under 11 U.S.C. § 104, and is currently $625.

[137]*Id.* § 318(4).

ifications of chapter 13 plans to reduce amounts required to be paid under the plan by certain amounts expended by debtors to purchase health insurance.[138] No changes were made to § 1329(b).

III. WHAT WE LEARN FROM THE LEGISLATIVE HISTORY IN INTERPRETING § 1329

When Congress enacted the Code in 1978, it required that chapter 13 plans comply with three requirements set out in § 1322(a).[139] Section 1322(b) provided ten additional provisions that could be included in a chapter 13 plan, but none of these was mandatory.[140] The only other provision included in § 1322 was § 1322(c) which limited the length of a chapter 13 plan to "three years, unless the court, for cause, approves a longer period, but

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[138]*Id.* § 102(i)(3).

[139]Section 1322(a), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978), provided:

> (a) The plan shall—
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> (1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
>
> (2) provide for the full payment, in deferred cash payments of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and
>
> (3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

[140]Section 1322(b), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978) stated:

> (b) Subject to subsections (a) and (c) of this section, the plan may—
>
> (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated;
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest *In* real property that is the debtor's principal residence, or of holders of unsecured claims;
>
> (3) provide for the curing or waiving of any default;
>
> (4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any unsecured claim;
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payments under the plan is due;
>
> (6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;
>
> (7) provide for the assumption or rejection of any executory contract or unexpired lease of the debtor not previously rejected under section 365 of this title;
>
> (8) provide for the payment of all or any part of a claim against the debtor from property of the estate or property of the debtor;
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> (9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time in the debtor or in any other entity; and
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> (10) include any other appropriate provision not inconsistent with this title.

the court may not approve a period that is longer than five years."[141] Any modification of the plan prior to confirmation had to "meet the requirements of section 1322 of this title,"[142] meaning that it had to include the mandatory provisions set forth in § 1322(a), could include the permissive provisions set forth in § 1322(b), but could not exceed the length prescribed by § 1322(c).

All six confirmation requirements were set forth in § 1325(a).[143] Section 1325(b) in its original form did not have anything to do with confirmation. Instead, it allowed the court, after confirmation of the plan, to "order any entity from whom the debtor receives income to pay all or any part of such income to the trustee."[144]

It is against this statutory background that one must interpret the Congressional intent behind the provisions governing post-confirmation modification of a chapter 13 plan in § 1329. Section 1329(a) originally allowed for modification of a chapter 13 plan to accomplish only three purposes: increasing or reducing payments, extending or reducing the time for payments, or altering the amount of payments to reflect payments made outside of the plan.[145] Because (1) the introductory language was phrased in a passive voice

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[141]Section 1322(c), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978).

[142]Section 1323, Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978).

[143]The court was directed to confirm a plan under § 1325(a), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978), if:

> (1) the plan complies with the provisions of this chapter and with other applicable provisions of this title;
> (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
> (3) the plan has been proposed in good faith and not by any means forbidden by law;
> (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim in the estate of the debtor were liquidated under chapter 7 of this title on such date;
> (5) with respect to each allowed secured claim provided for by the plan -
> (A) the holder of such claim has accepted the plan;
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than allowed amount of such claim; or
> (C) the debtor surrenders the property securing such claim to such holder; and
> (6) the debtor will be able to make all payments under the plan and to comply with the plan.

[144]Section 1325(b), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978).

[145]Section 1329(a), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978) stated as follows:

> (a) At any time after confirmation but before the completion of payments under a plan, the plan may be modified to—
> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

("the plan may be modified") and (2) under § 1321 only a debtor may propose a chapter 13 plan, § 1329(a) was interpreted to allow only the debtor to modify a confirmed plan.[146]

If the debtor sought to modify a plan, under § 1329(b)(1), the modification had to comply with "Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title."[147] Then, as now, § 1323(c) dealt with the treatment of secured creditors who had previously accepted or rejected the original chapter 13 plan and allowed them to change their views if the modification changed their rights.[148] But, at this time, §§ 1322(a) and 1322(b) were the exclusive provisions governing the contents of a chapter 13 plan, other than the limit on plan length, covered by § 1322(c). Section 1329(b)(1) did not mention § 1322(c) because § 1329(c) contained its own limitation on plan length applicable to a modified plan,[149] to avoid any suggestion that by modifying the plan the debtor could "start over" with a new three years (or potentially extend the payments beyond five years). Therefore, § 1329 required that a modified plan comply with all provisions relating to the contents of an original plan under § 1322. The legislative history of § 1329 explicitly endorses this interpretation.[150]

In addition, at the time § 1329(b)(1) was enacted, § 1325(a) was the sole section of the Code that provided requirements for confirmation of a chapter

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> (2) extend or reduce the time for such payments; or
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> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan, to the extent necessary to take account of any payment of such claim other than under the plan.

[146]*See* Barbosa v. Solomon, 235 F.3d 31, 40 (1st Cir. 2000); *In re* Anderson, Nos. 587-03218, 587-03236, 1989 WL 222971, at *3 (Bankr. N.D. Cal. Sept. 8, 1989); *In re* Nelson, 27 B.R. 341, 345 (Bankr. M.D. Ga. 1983). *See generally* 5 COLLIER ON BANKRUPTCY ¶ 1329.01[1][b], at 1329-5 (Lawrence P. King, ed., 15th ed. 1996); 5 William L. Norton, Jr., BANKRUPTCY LAW & PRACTICE § 124:2, p. 124-10 (2d ed. 2007).

[147]Section 1329(b)(1), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978).

[148]Section 1323(c), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978), provided:

> (c) Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder form what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection.

[149]Section 1329(c), Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978), provided:

> (c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause approves a longer period, but the court may not approve a period that expires after five years after such time.

[150]*See* S. REP. NO. 989, 95th Cong., 1st Sess. 143, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5929 ("A modified plan [under Section 1329] may not contain any provision which could not be included in an original plan as prescribed by section 1322."); H.R. REP. NO. 595, 95th Cong., 1st Sess. 431, *reprinted in* U.S. CODE CONG. & AD. NEWS 5963, 6387 ("Subsection (b) specifies that the normal provisions governing plan and preconfirmation modification apply to postconfirmation modification.").

13 plan. Congress did not "exclude" § 1325(b) from the list of provisions applicable to a modified plan when it drafted § 1329(b)(1) because there was no § 1325(b) that could have been applicable at the time.[151] In specifying that § 1325(a) applies to a modification to a chapter 13 plan, Congress was stating in § 1329(b)(1) that a modified chapter 13 plan must satisfy all the confirmation requirements applicable to the original chapter 13 plan. Again, the legislative history is consistent with this view.[152]

The language of §§ 1329 and 1325 when they were enacted in 1978 demonstrates that Congress intended a modified chapter 13 plan contain all the provisions, and satisfy all the requirements, necessary for confirmation. Consequently, the current language of those sections should not be interpreted to embrace a different philosophy unless the history of the amendments made to those sections establishes that Congress clearly and unequivocally expressed that it no longer wished modifications of chapter 13 plans to meet the same requirements as the original confirmed plan. The history of the amendments to §§ 1325 and 1329 does not provide any evidence of a change in approach. In fact, the history of the amendments to those sections suggests that, to the contrary, Congress intended that all chapter 13 plans satisfy the new disposable income test, and, if the debtor's projected disposable income increased, unsecured creditors should be able to move to modify the plan to capture that additional income.

If we begin with the conclusion that § 1329(b)(1) originally required that a modified plan comply with all requirements for confirmation, the question is whether Congress intended to exclude the disposable income test from the requirements for modification of a plan when that test was later incorporated in § 1325(b). Because Congress never amended § 1329(b)(1) to express any such intent explicitly (as, for example, by adding words like "but not Section 1325(b)" in its text), its intent could only be inferred from its failure to amend § 1329(b)(1) to add an explicit reference to § 1325(b) as a condition to modification of a chapter 13 plan. There are two points in time when such an amendment might have been contemplated: when § 1325(b) was enacted in 1984, and when both §§ 1325(b) and 1329 were amended in 2005. The legislative history of those amendments demonstrates that at neither time did Congress intend to change the basic understanding of § 1329(b)(1) that required that all conditions to confirmation be satisfied for modified chapter 13 plans.

As described in Part II above, almost all of the early bills that proposed to effectuate an "ability-to-pay" requirement for a chapter 13 plan imposed the

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[151] *See* discussion at note 144 *supra*.

[152] *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 431, *reprinted in* U.S. CODE CONG. & AD. NEWS 5963, 6387 (discussing application of § 1325(a)(4) to "confirmation of a modified plan").

new requirement as a part of § 1325(a), either as a gloss on the "good faith" standard of § 1325(a)(3) or in addition to the "best efforts" test of § 1325(a)(4). Because those new tests were to be part of § 1325(a), it was unnecessary to consider amending § 1329(b)(1), which already expressly referenced § 1325(a).

Later Congressional proposals changed from requiring the debtor's "best effort" or a "good faith effort" to pay his or her debts to an objective standard requiring devotion of all his or her "disposable income" to that payment. Only then did the new requirement (with its related definition) appear in a separate subsection of § 1325, § 1325(b). The decision to move the requirement from § 1325(a) to a new § 1325(b) was probably motivated by drafting convenience (attempting to include both the substantive requirement and the definition of "disposable income" in a clause of § 1325(a) would have been cumbersome) rather than by some substantive judgment about plan modifications.

When the new § 1325(b) was proposed, the interdependence of the two subsections of § 1325 was apparent from its structure. Subsections (a) and (b) were never mutually exclusive provisions; although it would be possible to obtain confirmation of a chapter 13 plan by compliance with § 1325(a) alone, it would never be possible to confirm a plan under § 1325(b) without also complying with § 1325(a). In other words, § 1325(b) was intended to set forth an additional requirement for confirmation of a plan whenever the trustee or the holder of an allowed unsecured claim objected to confirmation, not an alternative method of confirmation, and therefore it was always integral to the confirmation requirements of § 1325(a). This is why the introductory language to § 1325(a) was modified to include the phrase "[e]xcept as provided in subsection (b)" to the directive mandating confirmation upon satisfaction of the § 1325(a) requirements. This is also why no explicit reference to § 1325(b) in § 1329(b)(1) was necessary as a drafting matter.

Although some of the bills that included a new § 1325(b) did include a proposed amendment to § 1329 that would explicitly allow the holder of an unsecured claim to seek modification of a confirmed chapter 13 plan to apply the new disposable income requirement,[153] none of those bills passed either chamber. Instead, the Senate passed a bill that modified § 1325(a)(3) to require that a chapter 13 plan "represents a bona fide effort which is consistent with the debtor's ability to repay his debts, after providing support for himself and his dependents"[154] and added a new § 1325(a)(6) to mandate a five-year term unless it "provide[d] for payments of a reasonable portion of all

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[153]*See* discussion at note 99-106 *supra.*

[154]S. 445, 98th Cong., 1st Sess. §220 (Feb. 3, 1983 (legislative day Jan. 25, 1983)).

allowed unsecured claims."[155] Because the bill proposed to modify only § 1325, no change to § 1329(b)(1) was necessary to ensure that the ability-to-pay test would be applicable to modifications.

In the final negotiations aimed at resolving the Constitutional crisis created by *Marathon*, the House passed a bill that included the disposable income test in a separate subsection, § 1325(b), rather than including a new paragraph in § 1329(b) as the prior bills had provided. The bill also included an amendment to § 1329(a) to allow the trustee or a holder of an allowed unsecured claim to move for modification to a confirmed chapter 13 plan. The linkage of those two amendments strongly suggests that the purpose behind a motion to amend from the trustee or an unsecured creditor would be to compel a debtor to devote increased disposable income to the plan. This is the version that was passed by the Senate as well and became law in 1984.

Obviously, if Congress had amended § 1329(b)(1) to include § 1325(b) in the listed provisions applicable to plan modifications, its intent would have been clear. However, the failure of Congress to amend the preexisting § 1329(b)(1) to include newly-enacted § 1325(b) should not be read in the same way as would failure to include the provision if § 1329(b)(1) were being drafted for the first time contemporaneously with the drafting of § 1325(b). There is nothing in the legislative history that indicates that Congress affirmatively rejected the idea of including § 1325(b) in § 1329(b)(1), as some courts have intimated.[156] Indeed, most scholars believe that the failure to include the new provision was a drafting error because the policy reasons for imposing the disposable income test were equally applicable to plan modifications.[157]

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[155]*Id.* § 220. The word "payments" was changed to "payment" in the Senate Judiciary Committee. A bill with identical language for proposed amendments to § 1325(a) was introduced in the House a month later. H.R. 1800, 98th Cong., 1st Sess. § 120 (Mar. 2, 1983). Two other bills were introduced in the House during the same period, both of which proposed the same amendment to § 1325(a)(3) as S. 445, but requiring that a chapter 13 plan either have a duration of five years or provide "for payments of at least 70 per centum of all allowed unsecured claims." H.R. 1169, 98th Cong., 1st Sess. § 19 (Feb. 2, 1983); H.R. 3205, 98th Cong., 1st Sess. § 19 (June 2, 1983).

[156]*See, e.g.*, Neidich v. Lorenzo (*In re* Lorenzo), No. 13-23100, 2014 WL 1877408, at *4 n.3 (S.D. Fla. May 9, 2014) (Congress "chose not to amend these four provisions upon the addition of § 1325(b) to the Code in 1984") and at *5 ("It could have expressly provided that § 1325(b) applies as well, but it chose not to").

[157]*See* Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 255.1, at ¶ 9, Sec. Rev. June 15, 2004, www.Ch13online.com ("Policy arguments support application of § 1325(b) at modification after confirmation"); 5 COLLIER ON BANKRUPTCY § 1329.01[3][c], at 1329-9 (Lawrence P. King, ed. 15th ed. 1996) ("[I]f the trustee or the holder of an unsecured claim objects to a modification proposed by the debtor, then the ability-too-pay test of section 1325(b) must probably be satisfied as well."); 5 COLLIER ON BANKRUPTCY, ¶ 1329.01[3][c] at 1329-9 n.43a (Lawrence P. King, ed., 15th ed. 1996) ("The omission of 11 U.S.C. § 1325(b) from the list in 11 U.S.C. § 1329(b)(1) was probably legislative oversight. It is hard to imagine that Congress, having decided to impose the ability-to-pay test, would

Of course, Congress had the opportunity to rectify that error when it amended both § 1325(b) and § 1329 in 2005. As discussed in Part II,[158] Congress amended § 1325(b) to replace the three-year period in the disposable income test with the concept of the "applicable commitment period," which was also defined in that section the duration of which depended on whether the debtor was an above-median debtor or not. Congress also circumscribed judicial discretion by providing a definition of the debtor's "disposable income" based on his or her "current monthly income,"[159] a term which is defined as the average monthly income received during the six months prior to the bankruptcy filing.[160] At the same time Congress amended § 1329 to add subsection (a)(4), allowing modification of a chapter 13 plan in certain circumstances to reduce amounts to be paid under the plan by the amount actually expended by the debtor to purchase health insurance.[161] Congress did not amend § 1329(b), which some courts interpret to mean that Congress was embracing the omission of § 1325(b) from the modification requirements.[162]

However, Congress may have declined to add § 1325(b) to § 1329(b)(1) because Congress believed that such a reference was not necessary. This view is bolstered by the amendment that Congress did make in the 2005 amendments to the comparable provision in chapter 12, § 1229.[163]

As is true for a chapter 13 plan, a court is directed to confirm a chapter 12 plan if it complies with the requirements of § 1225(a) "[e]xcept as provided in subsection (b)."[164] Section 1225(b)(1) provides that, "[i]f the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan," the court may not confirm the plan unless the disposable income test is

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not also impose it as to plan modifications."); 5 William L. Norton, Jr., BANKRUPTCY LAW & PRACTICE § 124:2, p. 124-18 (2d ed. 2007) ("The failure to include Code § 1325(b) in the list of sections applicable to postconfirmation modification under Code § 1329(b) is probably legislative oversight."). *Cf.* 8 COLLIER ON BANKRUPTCY ¶ 1229.01 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2015) (stating that the omission of § 1225(b) from § 1229(b)(1) "was probably unintentional as it is unlikely that Congress intended the requirement to apply to the initial confirmation of a plan but not to confirmation of a modified plan"). *But see* 8 COLLIER ON BANKRUPTCY ¶ 1329.03 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2015) ("having had the opportunity to provide that section 1325(b) applies in all respects to modifications, Congress chose not to do so.").

[158]*See* discussion at notes 131-133 *supra*.

[159]11 U.S.C. § 1325(b)(2).

[160]11 U.S.C. § 101(10A).

[161]11 U.S.C. § 1329(a)(4).

[162]*See, e.g., In re* Niday, 498 B.R. 83, 87 (Bankr. W.D. Va. 2013) ("perhaps it is worthy of note that the [2005] legislation did amend § 1329 by adding subsection (a)(4) dealing with health insurance expenditures [without amending § 1329(b)]"); *In re* White, 411 B.R. 268, 273 (Bankr. W.D.N.C. 2008) ("when presented with the opportunity to add the reference to § 1325(b) in § 1329(b) with BAPCPA, Congress declined to do so").

[163]11 U.S.C. § 1229.

[164]11 U.S.C. § 1225(a).

satisfied.[165] Unlike for chapter 13, the definition of "disposable income" for chapter 12 was not amended to refer to "current monthly income" of the debtor, but instead means "income which is received by the debtor and which is not reasonably necessary to be expended" for maintenance or support of the debtor and the debtor's dependents, or for the operation of the debtor's business.[166]

In language that was modeled on § 1329(b)(1), § 1229(b)(1) states that "Sections 1222(a), 1222(b), and 1223(c) of this title and the requirements of section 1225(a) of this title apply to any modification under subsection (a) of this section."[167] There is no reference to § 1225(b), which contains the disposable income test applicable to a chapter 12 plan upon objection by the trustee or the holder of an allowed unsecured claim.

In 2005, Congress did not amend § 1229(b)(1) either. However, it did amend § 1229(d) to bar modification of a chapter 12 plan "by anyone except the debtor, based on an increase in the debtor's disposable income, to increase the amount of payments to unsecured creditors required for a particular month so that the aggregate of such payments exceeds the debtor's disposable income for such month."[168] If the trustee or the holder of an unsecured claim were not permitted to seek modification of a chapter 12 plan based on an increase in debtor's disposable income, there would have been no need for such an amendment. And, if the trustee or the holder of an allowed unsecured claim can seek a chapter 12 plan modification based on increased disposable income, certainly one would argue that the trustee or such a holder can seek a chapter 13 plan modification under the parallel language of Section 1329(a).

It is important to note that, even if Congress did not explicitly include § 1325(b) in the list of provisions applicable to chapter 13 plan modifications in § 1329(b)(1), neither did it exclude that provision. Section 1329(b)(1) does not purport to make §§ 1322(a), 1322(b), and 1323(c) and the requirements of § 1325(a) the sole provisions that apply to a modification under § 1329(a) (to the exclusion of all others); it simply states that those provisions apply. It is thus unlikely that Congress intended, when it subsequently added additional requirements for the content of a chapter 13 plan, that those requirements would not also apply to modified plans.

For example in 1994 Congress added subsection (e) to § 1322, requiring that, if a chapter 13 plan proposes to cure any default, the amount necessary to effectuate such a cure "be determined in accordance with the underlying

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[165] 11 U.S.C. § 1225(b)(1).

[166] 11 U.S.C. § 1225(b)(2).

[167] 11 U.S.C. § 1229(b)(1).

[168] 11 U.S.C. § 1229(d)(2), added by Pub. L. No. 109-8, § 1006(b), 119 Stat 23 (Apr. 20, 2005).

agreement and applicable nonbankruptcy law."[169] In the 2005 amendments to the Code, Congress inserted a new subsection (f) in § 1322, forbidding a plan from "materially alter[ing] the terms of a loan [from a pension plan or thrift savings plan]."[170] Certainly no one would suggest that a court could approve a modified chapter 13 plan that either provided a different computation of a cure amount from that specified in § 1322(e), or which purported to materially alter a pension plan loan in violation of § 1322(f). If a court were to seek authority precluding such a modification, the court would undoubtedly point to § 1329(b)(1) and its inclusion of § 1325(a)(1) which requires that the plan comply "with the provisions of this chapter [13]." The same authority bars a modification that violates § 1325(b).

IV. *LANNING* AND THE UNCONFIRMABLE PLAN MODIFICATION

If the legislative history strongly supports the view that Congress intended the disposable income test to apply throughout the life of a chapter 13 plan, and the statutory language can be read to reflect that view (albeit, not with the clarity one might wish), why do most courts reject that interpretation and conclude that the disposable income test is not applicable to plan modifications? I suggest that the rejection of the disposable income test in the context of plan modifications, in large part, reflects hostility towards the constraints of the means-testing provisions of the 2005 amendments.

As discussed above,[171] in 1984 Congress first required that, if the trustee or a holder of an allowed unsecured claim objected to confirmation of a chapter 13 plan, the plan must provide for dedication of the all the debtor's "projected disposable income" to be received in the three years following the first date on which plan payments were to be made.[172] "Disposable income" was defined as "income which is received by the debtor and which is not reasonably necessary to be expended" for debtor's maintenance or support or for business expenditures.[173] This formulation not only permitted courts to confirm plans when the debtor's anticipated income or expenses varied from historical patterns, but also allowed courts considerable latitude to take into account changes in anticipated income and expenses over the life of a plan when modifications were sought.

The 2005 amendments stripped the bankruptcy courts of much of this discretion, by redefining "disposable income" to mean "current monthly income received by the debtor" with certain exclusions, "less amounts reasona-

[169]11 U.S.C. § 1322(e), added by Pub. L. No. 103-394, §305(c), 108 Stat. 4106 (Oct. 22, 1994).
[170]11 U.S.C. § 1322(f), added by Pub. L. No. 109-8, § 224(d), 119 Stat. 23 (Apr. 20, 2005).
[171]*See* discussion at notes 116-125 *supra*.
[172]Pub. L. No. 98-353, § 317(3), 98 Stat. 333 (July 10, 1984).
[173]*Id.*

bly necessary to be expended" for maintenance or support or certain charitable contributions or business expenses.[174] The new definition created two problems. First, the reference to "current monthly income" in the definition—a new term that was defined to mean the average monthly income of the debtor derived during the six-month period prior to the bankruptcy filing[175]—meant that the income figure used to compute projected disposable income had no necessary relationship either to the actual income the debtor was receiving at the time the debtor filed for bankruptcy protection or to the income which the debtor anticipated receiving during the life of the chapter 13 plan.[176] Second, for an above-median debtor, Congress also required use of the means-testing provisions of § 707(b)(2) in determining which expenses were "reasonably necessary" for debtor's maintenance or support,[177] which don't necessarily reflect the expenses actually being incurred by the debtor at the time of filing, or anticipated to be incurred by the debtor during the following five years (the applicable commitment period for an above-median debtor).

The harshness of these make-believe figures was exacerbated by those courts that concluded, prior to the Supreme Court's decision in *Hamilton v. Lanning*,[178] that "projected disposable income" was to be determined by taking the "disposable income" figure so-computed, and simply multiplying it by the applicable commitment period for the debtor, three or five years.[179] As the Supreme Court noted in *Lanning*, this approach would produce "senseless results" when the "debtor's disposable income during the 6-month look-back period is either substantially lower or higher than the debtor's disposable income during the plan period."[180] It is, therefore, not surprising that courts overwhelmingly concluded, prior to *Lanning*, that when a debtor sought modification of a chapter 13 plan based on changed circumstances the court should look at the debtor's actual income and expenses at the time of the proposed modification, rather than the historical figures used to confirm the plan, thereby rejecting application of the projected disposable income test of § 1325(b).[181]

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[174]11 U.S.C. § 1325(b)(2).

[175]11 U.S.C. § 101(10A).

[176]As noted by Judge Lundin, "there is a crucial disconnect between the debtor's ability to pay creditors and the amount the debtor will be required to pay to satisfy the tests for confirmation after BAPCPA. . . . [I]t will now be true in many more chapter 13 cases that the actual financial circumstances of the debtor will not be accurately reflected in the strange mathematics of confirmation." Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 506.1, at ¶ 17, ¶ 20, Sec. Rev. Mar. 29, 2006, www.Ch13online.com.

[177]11 U.S.C. § 1325(b)(3).

[178]560 U.S. 505 (2010).

[179]*See, e.g.*, Maney v. Kagenveama (*In re* Kagenveama), 541 F.3d 868 (9th Cir. 2008).

[180]Hamilton v. Lanning, 560 U.S. 505, 520 (2010).

[181]*See, e.g.*, *In re* McCully, 398 B.R. 590 (Bankr. N.D. Ohio 2008); *In re* Hill, 386 B.R. 670 (Bankr. S.D.

The Supreme Court in *Lanning* rejected this mathematical computation of "projected disposable income" in favor of an adjustment of current monthly income for changes in income or expenses that were "known or virtually certain at the time of confirmation."[182] The logical import of this holding is that a court could consider the debtor's actual income and expenses at the time of a proposed plan modification, because those would be "known or virtually certain" at that time.[183] However, by the time the Supreme Court clarified the protected disposable income test, many courts had already held that the disposable income test was inapplicable to chapter 13 plan modifications.

Most courts that have found § 1325(b) inapplicable to chapter 13 plan modifications do, in fact, consider changes in debtor's disposable income in making their decision whether to approve or disapprove a proposed modified plan. They do so either by incorporating that factor as part of their analysis of whether the plan satisfies the "good faith" requirement of § 1325(a)(3), or the "best efforts" requirement of § 1325(a)(4), or just as a consideration that bears on whether they should exercise their discretion in approving a proposed modification under § 1329(a).[184]

The reason for the enactment of § 1325(b) was that Congress did not wish the debtor's ability to pay to be subsumed into the confirmation requirements of § 1325(a). To return to that discredited approach for approval of plan modifications is contrary to the basic premise of the 1984 amendments.[185]

More fundamentally, Congress never intended that a modified chapter 13 plan be one that could not have been confirmed in the first instance. Despite the assertions of those courts that distinguish between a "confirmation" and a "modification" of a plan,[186] most courts have recognized that "[m]odification of a plan is essentially a new confirmation."[187] More important, the Code

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Ohio 2008); *In re* Ewers, 366 B.R. 139 (Bankr. D. Nev. 2007); *In re* Howell, No. 07-80365, 2007 WL 4124476 (Bankr. W.D. La. Nov. 19, 2007).

[182]*Id.* at 524.

[183]*See In re* Prieto, No. 08-3308, 2010 WL 3959610, at *3 (Bankr. M.D. Fla. Sept. 22, 2010) (interpreting *Lanning* to evidence "the intent under Chapter 13 to determine a debtor's actual income and expenses during the life of his chapter 13 plan for purposes of establishing his plan payments" and granting trustee's motion to modify). One of the leading bankruptcy treatises has failed to recognize the significance of *Lanning* in interpreting § 1329(b) when it suggests that "section 1325(b) is not one of the provisions incorporated in section 1329(b), and could not be in light of the amendment to 1325(b) which *requires the use of the debtor's prepetition income amounts to determine plan payments.*" 8 COLLIER ON BANKRUPTCY ¶ 1329.05 (Alan N. Resnick & Henry J. Sommer et al., eds., 16th ed. 2015) (emphasis supplied).

[184]*See* cases cited in note 35 *supra.*

[185]*Cf.* Carlson, *supra* note 35, 83 AM. BANKR. L.J. at 618 (characterizing the requirement that debtor devote surplus disposable income to pay creditors as "grounded in the basic chapter 13 bargain" after the 1984 amendments).

[186]*See* cases cited in note 26 *supra.*

[187]Ledford v. Brown 219 B.R. 191, 194 (B.A.P. 6th Cir. 1998); *see also In re* Tagliarini, No. 02-19446,

itself characterizes a modification of a chapter 13 plan under § 1329 as a confirmation in § 1330(b), which provides that, if the court revokes an order of confirmation the court must either covert or dismiss the case under § 1307 unless "the debtor proposes and the court *confirms* a modification of the plan under section 1329 of this title."[188] The Code also characterizes a chapter 12 plan modification as a "confirmation" in § 1230(b).[189]

An approved chapter 13 modification that is not confirmable is an oxymoron. Thus, it is time for bankruptcy courts to apply § 1325(b)—as interpreted by the Supreme Court in *Lanning*—to plan modifications.

2005 Bankr. LEXIS 3172, at *5 (Bankr. N.D. Ohio Apr. 1, 2005). *Cf.* Harry L. Deffebach, *Postconfirmation Modification of Chapter 13 Plans: A Sheep in Wolf's Clothing*, 9 BANKR. DEV. J. 153, 155 (1992) (stating that, "[i]f modification is permissible, the court should apply the same standards used in confirming the original plan.").

[188]11 U.S.C. § 1330(b) (emphasis supplied).

[189]11 U.S.C. § 1230(b).