

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE: HOWARD L. MCCARTHY, JR.

CASE NO. 06-40127-DML-13

DEBTOR

**ON EN BANC HEARING BY
THE BANKRUPTCY JUDGES
FOR THE NORTHERN DISTRICT OF TEXAS**

TRUSTEE'S BRIEF

March 31, 2008

Submitted by:

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STATEMENT OF THE ISSUES

PRIMARY ISSUE

1. Whether a debtor who has paid in full all monetary sums due under his confirmed chapter 13 plan is entitled to a discharge before the 5 year applicable commitment period has expired if the plan does not provide for payment in full of all allowed unsecured claims.

a. What is the meaning of the phrase “applicable commitment period” used in sections 1325(b)(1) and (4)?

b. Is it a multiplier or temporal (or both)?

c. What significance, if any, does it have for the meaning of the phrase “completion of payments” as used in section 1328(a) concerning discharge?

RELATED ISSUES

2. Whether a plan that does not propose payment in full of all allowed unsecured claims may be confirmed if it provides for a durational term less than the applicable commitment period, even though the debtor has no projected disposable income, or has negative disposable income, or the plan provides that allowed unsecured claims will be paid a monetary sum equal to the product of the annualized dollar amount of monthly disposable income multiplied by the applicable commitment period.

a. What is the meaning of the phrase “applicable commitment period” used in section 1325(b)(1) and (4)?

b. Is it a multiplier or is it temporal (or both)?

c. What significance does the phrase “projected disposable income” have as used in section 1325(b)(1)(B) concerning confirmation of plans?

d. If the “applicable commitment period” is temporal, what significance, if any, does it have for the meaning of the phrase “completion of payments” as used in section 1328(a) concerning discharge.

This issue is related to the primary issue because if the “applicable commitment period” as used in section 1325(b)(1) and (4) is a multiplier only, and not a durational term, then there is no basis to argue that a discharge should be withheld (or that a plan may be modified) after the calculated monetary amount has been paid, regardless of the timing of the payment.

3. Whether a plan may be modified after a debtor has paid in full all monetary sums due under his plan, if the 5 year applicable commitment period has not expired.

a. What is the meaning of the phrase “applicable commitment period” used in sections 1325(b)(1) and (4)?

b. Is it a multiplier or temporal (or both)?

c. What significance, if any, does the phrase “completion of payments” have as used in section 1329(a) concerning modification of plans after confirmation.

This issue is relevant to the primary issue if the term “applicable commitment period” is temporal because if a trustee or creditor may not propose a modification to capture material increases in net income that occur during the life (term) of the plan after completion of payments but before expiration of the applicable commitment period, then there is no practical reason to delay granting the debtor’s discharge during such period.

4. Whether a debtor can shorten a plan term below the applicable commitment period and pay off a plan early (prior to the expiration of the applicable commitment period) e.g., from the proceeds of sale or refinance of exempt property or a gift, without going through the plan modification process.

Most Apposite Cases

In re Fridley, 380 B.R. 538 (BAP 9th Cir. 2007)

In re Hardacre, 338 B.R. 718 (N.D. Tex. 2006)

In re Killough, 900 F.2d 61 (5th Cir. 1990)

In re Meza, 467 F.3d 874 (5th Cir. 2006)

In re Slusher, 359 B.R. 290 (Bankr. D. Nev. 2007)

In re Smith, 237 B.R. 621 (Bankr. E.D. TX 1999), AFFIRMED 252 B.R. 107 (Dist. E.D. TX 2000), AFFIRMED 252 B.R. 1357 (5TH Cir. 2001)

Controlling and Legislative Provisions

11 U.S.C. § 1325(b)(4)(A)

11 U.S.C. § 1325(b)(4)(B)

11 U.S.C. § 1328(b)(1)(B)

11 U.S.C. § 1329(a)

H.R. Rep. 109-31(1) p.79, 109th Cong. 1st Sess. 2005
Cong. & Admin. News 2005, pp 88, 146

STATEMENT OF THE CASE

This Chapter 13 bankruptcy case was filed on January 12, 2006. The proposed Plan, Statement of Current Monthly Income and Disposable Income (Form 22C), and Schedules were filed on January 13, 2006.

Debtor's Plan provided for variable payments of \$200.00 per month for 6 months and \$890.00 per month for 54 months for a total term of 60 months, a Plan base of \$49,260.00, and an unsecured creditors' pool of \$29,194.20. It was confirmed on April 13, 2006. After the Trustee filed his "Notice of Chapter 13 Plan Completion" on September 10, 2007, Debtor filed his "Debtor's Motion For Certification And Entry Of Chapter 13 Discharge Pursuant To 11 U.S.C. § 1328(a)" on November 28, 2007. The Trustee filed his Response on December 5, 2007, saying, inter alia, that the 60-month applicable commitment period had not yet expired.

The parties Stipulated to the relevant facts on January 31, 2008 (Appendix 1), and submitted the matter to the bankruptcy court for determination.

On February 19, 2008, the bankruptcy court issued its Clerk's Notice 2008-01 setting this matter for en banc consideration by the court under General Order 2006-03.

STATEMENT OF THE FACTS

The relevant facts are set forth in the First Amended Stipulations filed January 31, 2008, (Docket #32), attached hereto as Appendix 1.

SUMMARY OF THE ARGUMENT

Section 1328(a) of the Bankruptcy Code provides that the court "shall grant the debtor a discharge" (subject to certain conditions not here relevant) "as soon as practicable after completion by the debtor of all payments under the plan." (emphasis supplied)

Section 1325(b)(4)(A) prescribes an “applicable commitment period” of 5 years for a debtor who, as here, has an annualized current monthly income greater than (above) his state’s median family income for his household size.

Section 1325(b)(4)(B) allows the “applicable commitment period” to be less than 5 years only if his plan provides for payment in full of all allowed unsecured claims.

The question to be decided is whether a debtor may be considered to have “completed” his “payments under the plan,” and thus entitled to his discharge under section 1328(a), when the “applicable commitment period” has not expired.

The answer depends on whether the “applicable commitment period” is deemed to be “temporal,” i.e. a minimum plan length, or monetary, i.e. a “multiplier,” or both, and whether it is even relevant to a section 1328(a) discharge determination.

Although there is dicta in several Pre-BAPCPA cases in the 5th Circuit saying that a debtor is entitled to his discharge after completing all monetary payments due under the plan, there is no holding on the precise issue and it may not have been briefed or argued. This court should consider the well reasoned authorities from other circuits dealing with the new language and policies of BAPCPA as they relate to the particular issues presented by this case.

As explained below, the better reasoned decisions consider the applicable commitment period to be “temporal” and deny discharge prior to its expiration, unless the plan term is reduced by a post-confirmation plan modification.

This court should concur.

ARGUMENT

I.

9TH CIRCUIT HOLDING, 5TH CIRCUIT DICTA, AND OTHER DICTA

A. Discussion of In re Fridley

In re Fridley, 380 B.R. 538 (9th Cir. BAP 2007).

Fridley is a Post-BAPCPA case directly on point. In Fridley the Chapter 13 debtors moved for entry of an order of discharge following their lump sum prepayment of sums that were to be distributed under their confirmed plan. The trustee opposed the motion on the theory that the debtors had not yet “completed all payments under the plan.” The Bankruptcy Court denied the debtors’ motion for discharge. The Bankruptcy Appellate Panel affirmed, holding that the debtors, in the absence of an order modifying their confirmed 36-month plan, could not “complete” their plan early by prepaying the amounts that were to be distributed thereunder, so as to qualify for early discharge.

The BAP stated, “The narrow statutory question is whether the phrases ‘completion by the debtor of all payments under the plan’ and ‘completion of payments under (the) plan’ in U.S.C. §§ 1328(a) and 1329(a) include an implied temporal requirement that the plan remain in effect for the ‘applicable commitment period’ as specified in the plan.” Citing its pre-BAPCPA decision in In re Sunahara, 326 B.R. 768 (9th Cir. BAP 2005) the court stated, “Our answer prior to ... (BAPCPA) was that early completion of a chapter 13 plan by paying a lump sum without full payment of allowed claims required a § 1329(a)(2) plan modification to reduce the time for payments” We now adhere to our Sunahara precedent in cases subject to BAPCPA.” Further, “Before BAPCPA, the § 1325(b)(1) ‘three-year period’ operated as a temporal requirement (citations omitted).” “After BAPCPA, the § 1325(b)(1) ‘applicable commitment

period continues to operate as a temporal requirement.” The court stated that it agreed with the analysis articulated in In re Slusher, 359 B.R. 290 (Bankr. D. Nev. 2007).

The court supported its conclusion by pointing out that the obvious purpose of § 521 (f) of BAPCPA that requires that chapter 13 debtors provide post-petition tax returns, upon request, together with an annual statement that includes the amount and sources of income, is to provide information needed by a trustee or holder of an allowed unsecured claim in determining whether to propose § 1329 plan modifications to capture material increases in net income that occur during the life of the plan. The court said it is part of the statutory bargain inherent in chapter 13 that a debtor must, for the prescribed life of the plan, run the gauntlet of exposure to trustee or creditor requests to increase payments. BAPCPA, by creating a debtor’s duty to make information available to those who could propose modifications, actually reinforces this aspect of the statutory bargain.

“A debtor desiring to prepay a chapter 13 plan and obtain an early discharge without paying allowed unsecured claims in full must follow the § 1329 modification procedures prescribed by Rule 3015(g) The debtor cannot short-circuit that exposure merely by prepayment, but rather must obtain a § 1329 plan modification after having given the notice required by Rule 3015(h).”

“... pre-payment does not ‘complete’ their plan for purposes of §§ 1328(a) or 1329.”

In conclusion, the court held: “The debtors were not entitled to entry of discharge because there has not yet been ‘completion’ by the debtors(s) of all payments under the plan within the meaning of § 1328(a). The ‘applicable commitment period’ in § 1325(b) is a temporal requirement of thirty-six months in this case, rather than a multiplicand of monthly payments.

Hence, the statutory concept of ‘completion’ of payments includes the completion of the requisite period of time.”

B. Discussion of 5th Circuit Dicta

1. In re Smith, 237 B.R. 621 (Bankr. E.D. TX 1999), AFFIRMED 252 B.R. 107 (Dist. E.D. TX 2000), AFFIRMED 252 F.3d 1357 (5th Cir. 2001).

In Smith, a Pre-BAPCPA case, debtor’s plan provided for 56 monthly payments totaling \$14,495.27. In month 27 debtor tendered a lump sum payment of \$7,755.55 which had been given to her by her family, to pay off her plan. The Trustee accepted and distributed the money to creditors and filed his Notice of Plan Completion and Order Setting Discharge. BNB, a creditor, objected to the discharge because debtor had failed to make payments for a minimum of 36 months, and argued that the debtor’s lump-sum payment should be construed by the court to be a motion by the debtor to approve a post-confirmation modification of the plan to change the duration of the plan from 56 months to 27 months.

The bankruptcy court (Judge Parker) overruled the objection and granted debtor her discharge saying:

“BNB’s reliance upon § 1325(b)(1) in this situation is misplaced. § 1325(b)(1) is a plan confirmation statute ... it governs the determination of the precise amount which a Chapter 13 debtor is required to pay in order to confirm a Chapter 13 plan” (In other words, 36 months is a multiplier, not a durational term.)

“Once the confirmation order became a final order, the provisions of § 1325(b)(1) were no longer applicable to this case, absent a timely request for modification.”

“... debtor has not sought, nor does she need, a plan modification. Thus, without providing advance notice to any party, a chapter 13 debtor may tender all payments due and

owing under a confirmed plan on an accelerated basis and thereby create an entitlement to a discharge.”

The District Court, citing Matter of Casper, 154 B.R. 243, 246 (N.D. Ill. 1993) said, “Courts should not view the number of payments or the duration of a plan as controlling on the issue of whether a plan has been completed or not.” (In other words, the 36 month requirement of § 1325(b)(1)(B) is not relevant to a § 1328(a) discharge determination.)

The 5th Circuit summarized without adopting the holdings of the bankruptcy and district courts and held only that “... under the particular circumstances of this case, the district court did not err in affirming the bankruptcy court’s Order.”

Smith was a Pre-BAPCPA case, and the 5th Circuit opinion does not squarely address the “temporal” vs. “multiplier” issue on which the bankruptcy court decision rested, or the relevance of § 1325(b)(1)(B) to § 1328(a).

2. In re Meza, 467 F.3d 874 (5th Cir. 2006)

Meza was a Pre-BAPCPA case involving the issue of whether a Trustee’s Motion to Modify Plan was timely, when filed before debtor paid his confirmed plan balance, but heard after such payment.

In dicta, the court said, “Consistent with § 1329’s plain language, it is largely undisputed that a plan cannot be modified once all payments have been made.

“(I) f a trustee could amend a chapter 13 plan *after* the debtor completes his or her payments to the trustee, the mandatory nature of the discharge provision (11 U.S.C. § 1328) would be eviscerated.”

“Accordingly, if a debtor pays his plan balance and the trustee then seeks to modify the plan under § 1329 to account for newly-acquired funds, modification is *not* permitted.” (Citations omitted.)

The court cited with approval the bankruptcy court’s statement in Smith, (supra), “Without providing advance notice to any party, a chapter 13 debtor may tender all the payments due and owing under a confirmed plan on an accelerated basis and thereby create an entitlement to discharge.”

Meza was a Pre-BAPCPA case, and the 5th Circuit holding does not squarely address the “temporal” vs. “multiplier” issue or the relevance of § 1325(b)(1)(B) to § 1328(a).

3. In re Killough, 900 F.2d 61 (5th Cir. 1990)

Killough was a Pre-BAPCPA case involving whether overtime should be included in projected disposable income.

In dicta, the court said, “The bankruptcy court must take two steps in relation to this process (referring to a section 1325(b)(1)(B) projected disposable income determination). Initially, it must project the income of the debtor ‘over the next three years’ Collier on Bankruptcy, ¶1325.08 [4] [a] (15th ed. 1985). For practical purposes, this task is usually accomplished by multiplying the debtor’s monthly income by 36.”

Killough was a Pre-BAPCPA case, and the 5th Circuit holding does not squarely address the “temporal” vs. “multiplier” issue.

4. In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex 2006)

In Hardacre, a Post-BAPCPA case, Judge Nelms apparently disagreed with Judge Parker’s multiplier characterization in Smith, supra. Judge Nelms stated in dicta in Hardacre, “The ‘applicable commitment period’ is the term of the debtor’s plan. In general, unless the plan

provides for payment in full of all unsecured creditors over a shorter period of time, the minimum applicable commitment period is three years. 11 U.S.C. § 1325(b)(4)(A)(i).” (at p. 722)

As discussed below, the majority of Post-BAPCPA decisions have, like Judge Nelms, considered the “applicable commitment period” to be temporal, not a mere multiplier.

C. Discussion of Other Dicta

In re Frederickson, 375 B.R. 829 (8th Cir. BAP 2007)

In Frederickson, a Post-BAPCPA case, the trustee objected to confirmation of an above-median debtor’s 48 month plan. The holding of the court was that where there is no disposable income, there is no applicable commitment period, and a debtor may obtain confirmation of a plan that is shorter than five years.

In dicta, the court stated that the “applicable commitment period” in § 1325(b)(4) “... does not refer to a minimum plan duration. It referred, instead, to the time during which the debtor must pay projected disposable income to the Trustee for payment to unsecured creditors. Another statutory provision, § 1322(d), discusses the length of the plan related to above-median income debtor. Section 1322(d) would be superfluous if § 1325(b)(4) set the length of the plan.”

The interesting thing about Frederickson is that the court discussed Honorable Randolph J. Hanes’ article comparing the language of Chapter 13 § 1325(b)(2) with Chapter 11 § 1129(a)(15) and concluding that “projected disposable income” is simply annualized disposable income, calculated on Form 22C, and “applicable commitment period” rather than referring to the actual length of a plan, signifies the number of years by which to multiply the annualized disposable income to come to a total sum that the debtor must pay unsecured creditors under the

plan. Honorable Randolph J. Haines, Chapter 11 May Resolve Some Chapter 13 Issues, 8 Norton Bankr. L. Adviser I (Aug. 2007).

II.

THE STATUTORY FRAMEWORK

A. The Pre-BAPCPA Disposable Income Confirmation Requirements

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), one of the many components for plan confirmation established by section 1325, required that the value of property to be distributed under the plan on account of a claim be not less than the amount of the claim, or

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. (underscoring supplied)

11 U.S.C. § 1325(b)(1)(B).¹

B. Post-BAPCPA Statutory Disposable Income and Applicable Commitment Period Confirmation Requirements

Due to perceived abuses in the system, Congress deliberately and specifically reduced the discretion afforded the debtors, courts, and trustees in determining what minimal amount above-median debtors were obliged to pay their creditors. This was effected by altering the method by which disposable income is determined – at least for above median debtors. In addition, Congress extended the durational limit for above median debtors to five years.² Amended

¹ The Confirmation requirements of section 1325(b) apply only if an objection to confirmation is filed. The section 1325(a) requirements apply to all plans.

² Pre-BAPCPA, under section 1322(d) a plan could extend more than three years only upon a showing of “cause.” That provision was amended to make applicable only to below median debtors. 11 U.S.C. § 1322(d)(2). For above-median debtors, the statute was amended to provide that the plan may not provide for payments over a period that is longer than five years. 11 U.S.C. § 1322(d)(1).

section 1325(b) differentiates between debtors whose income level is above the median income level in their state of residence and those debtors whose income is below the median.

For above-median debtors, the “period” is now bifurcated. Rather than imposing a single three-year period, the amended statute refers to an “applicable commitment period”:

(b)(1) If the Trustee or 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.

11 U.S.C. § 1325(b)(1). The applicable commitment period for above-median debtors is defined:

For purposes of this subsection the “applicable commitment period ...

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

(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 ...

Part II of Form 22C determines “Applicable Commitment Period” by a simple matter of comparison. The debtor’s income from Part 1 is compared to the median income of the state and, if the income is above the applicable state level, the debtor is above-median.

III

THE BANKRUPTCY CODE'S SEPARATE DISPOSABLE INCOME AND APPLICABLE COMMITMENT PERIOD REQUIREMENTS

A. The Statute: Its Operation and Effect

It is undisputed that Mr. McCarthy, the debtor here, is “above-median.”

The debtor asserts that since he has met the disposable income payment requirement, he cannot be compelled to remain in a chapter 13 case for five years before receiving a discharge, despite the strictures of the Bankruptcy Code’s “applicable commitment period” established by section 1325(b). This argument ignores the language of the Code as well as the overall structure now imposed by BAPCPA. The Code not only requires payment of the disposable income amounts, it contains a durational requirement.

B. The Case Authority Applying Disposable Income and Applicable Commitment Period Requirements

Section 1325(b)(1) requires a debtor to propose a plan for the length of the “applicable commitment period.” For above-median debtors, that period of time is five years. 11 U.S.C. § 1325(b)(4). The majority of cases follow this construct: See, e.g., In re Alexander, 344 B.R. 742 (Bankr. E.D. N.C. 2006), In re Dew, 344 B.R. 655 (Bankr. N.D. Ala. 2006), In re Nance, 371 B.R. 358 (Bankr. S.D. Ill. 2007); In re Mullen, 2007 WL 1452234 (Bankr. D. Or. May 14, 2007); In re Beckerle, 2007 WL 111264 (Bankr. D. Kan. April 13, 2007); In re Gress, 344 B.R. 91 (Bankr. W.D. Mo. 2006) (Federman, J.); In re Schanuth, 342 B.R. 601 (Bankr. W.D. Mo. 2006) (Venters, J); In re Slusher, 359 B.R. 290 (Bankr. D. Nev. 2007); In re Davis, 348 B.R. 449 (Bankr. E.D. Mich. 2006).

There is a minority of authority which concludes that the stricture imposing the disposable income requirement is only monetary. Giving mere lip-service to the time

requirement, these cases conclude that only a specific return to general unsecured creditors is required by the statute because section 1325(b)(4) is merely a multiplier. That is, the debtor need only multiply the applicable commitment period by the monthly figure on line 58 of Form 22C. If the figure is positive, the debtor need remain in bankruptcy only long enough to pay that amount. If the figure is negative there is no time requirement imposed by the Code. See generally In re Davis, 348 B.R. 449, 453-54 (Bankr. E.D. Mich. 2006) (describing and exhaustively rejecting this proposition). These authorities appear to rest their conclusion less upon analysis than the fact that they find the requirement of maintaining a case for five years to be without purpose. See, e.g. In re Mathis, 367 B.R. 629 (Bankr. N.D. Ill. 2007); In re Lawson, 361 B.R. 215 (Bankr. D. Utah 2007); In re Fuger, 247 B.R. 94, 101 (Bankr. D. Utah 2006) (“[I]t makes little sense to hold the debtor hostage for 60-months plan where the debtor can satisfy the requirements of §1325(b)(1) in a shorter period.”). See In re Brady, 361 B.R. 765 (Bankr. D. N.J.). See Keith M. Lundin, Chapter 13 Bankruptcy § 500.1 (3d ed., Bankruptcy Press 2000 and Supp. 2006) “Under § 1325(b)(1), the applicable commitment period is a number of years that is multiplied by annualized disposable income to determine the amount of projected disposable income that must be paid to unsecured creditors to satisfy the confirmation test in § 1325(b)(1). The applicable commitment period does not require that the debtor actually make payments for any particular period of time. Rather, it is the multiplier in a formula that determines the *amount* of disposable income that must be paid to unsecured creditors.”

These authorities ignore the plain language of the statute and intent of the law. This appears to be based on dissatisfaction with its effect or believed unfairness in its application. Indeed, this is most notable in Fuger which described the law as requiring the debtor to “suffer”

despite “good fortune,” to being “sentenced” to or held “hostage” in a 60-month plan. Fuger, 347 B.R. at 100, 101.

To the extent there is any ambiguity or cause for confusion, the legislative history makes Congress’ intent clear:

Sec.318. Chapter 13 Plans to Have a 5-Year Duration in Certain Cases.

Paragraph (1) of section 318 of the Act amends Bankruptcy Code sections 1322(d) and 1325(b) to specify that a chapter 13 plan may not provide payments over a period that is not less than five years if the current monthly income of the debtor and the debtor’s spouse combined exceeds certain monetary thresholds. If the current monthly income of the debtor and the debtor’s spouse fall below these thresholds, then the duration of the plan may not be longer than three years, unless the court, for cause approve a longer period of up to five years. The applicable commitment period may be less if the plan provides for payment in full of all allowed unsecured claims over a shorter period. Section 318(2), (3), and (4) make conforming amendments to sections 1325(b) and 1329(c) of the Bankruptcy Code. (emphasis supplied)

H.R. Rep. 109-31(1), p. 79, 109th Cong. 1st Sess. 2005, U.S. Code Cong. and Admin. News 2005, pp. 88, 146

C. The Plethora of Reasons Mandating a Five-Year Requirement

The reasons for concluding that section 1325(b)(1) imposes a five-year durational requirement are extensively discussed in the relevant case authority, including In re Davis, 348 B.R. 449 (Bankr. E.D. Mich. 2006) (quoting extensively from Schanuth, 342 B.R. 601 (Bankr. E.D. Mo. 2006) and, more recently, In re Slusher, 359 B.R. 290 (Bankr. D. Nev. 2007). These reasons include:

- The plain language of the statute supports the temporal interpretation: the term “applicable commitment period” itself uses a word with temporal meaning: “period” means a “chronological division.” The length of the chronological division is described in temporal terms

of three years or five years. In re Davis, 348 B.R. 455 (quoting Schanuth, 341 B.R. at 606-08), and even states the starting point from which one calculates the time period. The terms, “commitment” and “period” “by their ordinary meaning contemplate or suggest action by the debtor over a period of time not ... a formula to arrive at a value or an amount” Davis, 348 B.R. at 456. Slusher, uses the definition for “period” as “a length of time” (citing: 11 Oxford English Dictionary 559 (J.A. Simpson and E.S.C. Weiner eds., 2d ed. Oxford Univ. Press 2001); the definition for “commitment” as “the committing of oneself ... (to a particular course of conduct)” (citing 3 Oxford English Dictionary 560); and the definition of “applicable” as “fit or suitable for its purpose; appropriate” (citing 1 Oxford English Dictionary 575); in analyzing the “plain meaning” of sections 1325(b)(1)(B) and (b)(4).

- The statute contains a specific exception which makes no sense or is nullified if there is no durational requirement. Section 1325(b)(4)(B) states that a plan may be shorter than three or five years “only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.” (emphasis supplied) Permitting a shorter period of time where unsecured creditors are not receiving a 100% dividend has the effect of nullifying that entire phrase of the statute.

- The legislative history, by its title and content state that the requirement is one of time:

Chapter 13 Plans to Have a 5-Year Duration in Certain Cases.

[A] chapter 13 plan may not provide payments over a period that is not less than five years.... The applicable commitment period may be less if the plan provides for payment in full of all allowed unsecured claims over a shorter period. (emphasis supplied)

H.R. Rep. 109-31(1), p. 79, 109th Cong. 1st Sess. 2005, U.S. Code Cong. & Admin. News 2005, pp 88. 146.

- A monetary interpretation of the applicable commitment period is a departure from pre-BAPCPA practice not justified by the language of structure of the statute. Davis, 348 B.R. at 455; In re Slusher, 359 B.R. 290, 302 (“It appears that the majority of pre-BAPCPA courts viewed the three-year requirement under pre-BAPCPA section 1325(b)(1)(B) as temporal in nature...and this court sees little reason to alter the reasoning merely because “applicable commitment period” was substituted for “three-year period.”)

- The statute is not merely a monetary provision created by a multiplication formula. Congress demonstrated that it knew the word “multiply” and used it when it meant to multiply, e.g. 507(a)(5)(B)(i), 704(b)(2), 707(b)(2)(A)(i), 707(b)(2)(B)(iv), 707(b)(6), 707(b)(7)A, 1325(b)(3), 1325(b)(4)(A)(ii), and 1326(b)(3)(B)(ii), Slusher, 359 B.R. at p. 302 and 1322(d)(1), 1322(d)(2), Davis, 348 B.R. at 456 (“Where Congress commanded a calculation to be performed to arrive at an amount, it said so, loudly, and by using the word “multiply.” On the other hand, § 1325(b)(1)(B) contains no reference to the word “multiply” but instead uses terms that in their ordinary, everyday meaning require a debtor to do something over a period of time.”)

- The conclusion that the applicable commitment period is only a multiplicand is inconsistent with other Code requirements which impose particular duties which can only be undertaken over a period of years, including tax return requirements under section 521(f) and other post-confirmation reporting requirements. Davis, 348 B.R. at 458.

- “... the essence of a chapter 13 case is that the debtor has made an ongoing *commitment* to provide all disposable income over a period of time to repay creditors. The use of the word ‘commitment’ within ‘applicable commitment period’ exemplifies this congressional goal, implying that the debtor has an ongoing obligation. With an ongoing obligation by the

debtor to remain in bankruptcy for the plan term, interested parties can monitor the debtor and capture any increases in the debtor's income during that time.” Slusher, 359 B.R. at 304.

- “... treating the term ‘applicable commitment period’ as a multiplicand would negate much of section 1329’s utility ... preventing interested parties from seeking a modification based on changed circumstances.” Slusher, 359 B.R. at 305.

CONCLUSION

The 5th Circuit has not yet ruled on the pivotal issue of whether the new term “applicable commitment period,” which was added to the Bankruptcy Code effective October 17, 2005, by BAPCPA, is a “multiplier” or “temporal.” Although Pre-BAPCPA cases (specifically Meza, Smith, and Killough) contain dicta that say or imply that the 36 month period specified in the prior version of section 1325(b)(1)(B) is a multiplier, post-BAPCPA cases (specifically Hardacre, Fridley, and Slusher), in well reasoned opinions, have held the plain language, the legislative history, and context with other statutory changes made by BAPCPA, make the “applicable commitment period” temporal, i.e., the minimum plan duration.

If the correct construction of the term is that it is a multiplier, then it could have no meaning for the term “completion by the debtor of all payments under the plan” as used in section 1328(a) pertaining to discharge, and Mr. McCarthy should be granted a discharge.

If however, the correct construction of the term is that it is the minimum plan term for purposes of confirmation, then it is only reasonable to consider it so for purposes of construing the term “completion by the debtor of all payments under the plan” (§ 1325(a) – discharge) and “completion of payments under such plan” (§ 1329(a) – modification). As such, Mr. McCarthy must wait for his discharge until after the 5 year term has expired or until it has been reduced by

a plan modification approved by the court, after notice and opportunity to object afforded to parties in interest.

Respectfully submitted:

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APPENDIX I
STIPULATIONS