No. 07-3391

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

DAVID D. COOP,
Trustee/Appellant,

—v.—

CRAIG MATTHEW FREDERICKSON,
Debtor/Appellee.

APPEAL FROM THE BANKRUPTCY APPELLATE PANEL
OF THE EIGHTH CIRCUIT
NO. 07-6025

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR AND AFFIRMANCE OF THE BANKRUPTCY APPELLATE PANEL DECISION

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January 8, 2008

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CORPORATE DISCLOSURE STATEMENT

DAVID C. COOP *v.* CRAIG MATTHEW FREDERICKSON, No. 07-6025

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock.
NONE.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.
NONE.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

/s/ Wendell J. Sherk Dated: January 8, 2008
Wendell J. Sherk, Esq.
Attorney for the National Association of Consumer Bankruptcy Attorneys

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STATEMENT OF INTEREST OF NACBA AS *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2,500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 500,000 bankruptcy cases filed each year. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Pyatt*, 486 F.3d 423 (8th Cir. 2007).

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, a significant number of whom file chapter 13 bankruptcies. The 2005 amendments created a new disposable income test under section 1325(b) for chapter 13 debtors. The Court's ruling on the issue presented will significantly affect debtors, both in this circuit and across the nation.

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CONSENT

This brief is being filed with the consent of all parties.

FACTUAL BACKGROUND

Debtor's Amended Form B22C, filed on December 13, 2006, shows that the Debtor has a current monthly income ("CMI") of $3,458.11 and an annualized CMI of $41,497.32. Because the Debtor's annualized CMI exceeds the amount of the applicable median family income, the Debtor is "above-median". After taking statutorily permitted and actual expenses, Amended Form B22C reflects that the Debtor has negative disposable income in the amount of (-$95.49). Schedule I reflects total monthly income of $2326.00 and Schedule J reflects monthly expenses of $1720.00, leaving "monthly net income" on Schedule J of $606.00.

The most significant reason for the difference between Form B22C and Schedules I and J, is the Debtor's expenses for food, clothing, and other household expenses. Congress has determined that the Debtor, under the applicable IRS guidelines, is permitted to claim reasonable living expenses of $825.00 (for food, clothing, household supplies, personal care and other miscellaneous items). *See* Form B22C, line 24. However, Schedule J shows that the Debtor spends only $575.00 on such items, or $250.00 less than the amount Congress has determined

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to be reasonable. *See* Schedule J, Lines 4, 5, 6, 9, 17 (Joint Appx., Tab 6C) Debtor also keeps his non-mortgage housing expenses $202.00 under the $337.00 permitted by the IRS. *Compare* Form B22C, line 25A *with* Schedule J, line 2 & 3.

The Debtor's Plan proposes using, in part, the savings from these two categories to pay $600 per month to the Chapter 13 Trustee for 48 months.

The Trustee objected to Debtor's Plan contending that, pursuant to 11 U.S.C. §1325(b)(4), the "applicable commitment period" for above-median debtors must be 5 years and that the Debtor's Plan therefore cannot terminate sooner than 60 months. The Trustee did not claim, nor could he have, that any significant change in income or expenses is expected in the future.

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SUMMARY OF ARGUMENT

The plain language of 11 U.S.C. §1325(b) provides a clear and specific formula for determining "disposable income" and requires the projection of such disposable income to determine payments to ***unsecured creditors***. As such, it changes both the definition and purpose of determining "disposable income." The bankruptcy appellate panel's interpretation of the statute is the only reading that gives meaning and purpose to all the statutory language. The Chapter 13 Trustee (the Trustee) appears to take the position that the figure reflected on B22 is not dispositive of the amount due to unsecured creditors. *See* Trustee Brief at 11.[1] Lastly, Trustee argues the Debtor must propose a 60-month plan even though there is no "disposable income" available to unsecured creditors. The "applicable commitment period" is only relevant if the debtor has both unsecured creditors and disposable income. If neither of these two variables exist, "applicable commitment period" has no meaning. Furthermore, artificially extending chapter 13 plans makes little sense and, in fact, punishes debtors for spending less. Where no disposable income will "be received" by unsecured creditors, debtors should be permitted to propose chapter 13 plans shorter than 60 months.

---

[1] This position appears to conflict with the trustee's position taken in the bankruptcy appellate panel where the trustee noted that "The trustee takes the position that the calculations made pursuant to Section 707(b) and reflected on Form 22C, are determinative of disposable income." Trustee BAP Brief at 4 (n.3). [Addendum A] In this case, there is no disposable income available to unsecured creditors. Therefore, there are no payments to be received by unsecured creditors.

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ARGUMENT

I. The plain language of 11 U.S.C. § 1325(b) provides a clear and specific formula for determining "disposable income" and requires the projection of such disposable income to determine payments to unsecured creditors.

The starting point for the court's inquiry should be the statutory language of 11 U.S.C. §1325(b)(2) itself. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004). It has been well established that when the "statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted).

Both the concept and purpose of "disposable income" were significantly changed by the 2005 amendments to the Bankruptcy Code. (BAPCPA) *See* 11 U.S.C. §1325(b). With the enactment of BAPCPA, the old understanding of disposable income was replaced with a new definition of "disposable income" based upon "current monthly income" and reasonable and necessary expenses or specified allowances. *See, e.g., In re Green,* 378 B.R. 30 (Bankr. N.D.N.Y. 2007); *In re Swan,* 368 B.R. 12 (Bankr. N.D. Cal. 2007); *In re Brady,* 361 B.R. 765 (Bankr. D.N.J. 2007); *In re Mitchell*, 2007 WL 1290349 (Bankr. Neb. Jan. 5, 2007); *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wis. 2006); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006).

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Section 1325(b)(2) states in relevant part:

> "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 … less amounts reasonably necessary to be expended- (A)(I) for the maintenance or support of the debtor or a dependent of the debtor..."

In essence, the formula for determining "disposable income" is:

{ **CMI** minus **specified adjustments** and minus **reasonably necessary expenses**}. Once "disposable income" is calculated it is "projected" to determine the amounts to be paid to unsecured creditors. Projecting disposable income, in theory, is not remarkably difficult or different than it was prior to the 2005 amendments. The significant change imposed by Congress, however, is in determining what amount is projected into the future. Prior to BAPCPA, plan payments were calculated by projecting the difference between the amounts listed on Schedules I and J (now called "monthly net income"). Congress has made clear its belief that a longer term historical income average would be more representative of the debtor's long term financial situation than a "snap shot" of the debtor's income as of the petition date and as shown on Schedule I. Similarly, rather than a "snap shot" of the debtor' estimated expenses as of the petition date and as shown on Schedule J, for "above-median" debtors Congress has mandated that reasonably necessary expenses be determined pursuant to section 1325(b)(3).

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Section 1325(b)(3), in turn, directs that reasonably necessary expenses ***shall*** be based on the expenses detailed in sections 707(b)(2)(A) and (B). Accordingly, section 1325(b)(1)(B), as amended by Congress, now requires the projection of a different number—a number which is derived by calculating "disposable income" in accordance with 11 U.S.C. § 1325(b)(2).

Lastly, these computations result in a determination of the amount to be paid to ***unsecured creditors***. Under amended section 1325(b), "disposable income" is no longer used to determine the appropriate ***plan payment***—a payment that previously included amounts to holders of allowed secured, administrative, priority and general unsecured claims. Now, "disposable income" is only used to determine the payout, if any, to holders of allowed unsecured claims. *See* Judge Randolph J. Haines, *Chapter 11 May Resolve Some Chapter 13 Issues*, Norton Bankruptcy Law Advisor, 2007 No. 8 NRTN-BLA 1 (Aug. 2007) (noting similar language added to chapter 11 in 2005 only requires a determination of the value of the property to be distributed under the plan; not plan duration)[Addendum B].

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II. Where debtors' disposable income available to unsecured creditors is zero or less, the court may confirm a plan that is shorter in duration than the "applicable commitment period."

A. The court need not address whether the term "applicable commitment period" is a temporal or monetary component because debtors have zero disposable income available for unsecured creditors.

Section 1325(b)(1)(B) states that a court may not approve a debtor's chapter 13 plan over a creditor or trustee's objection unless:

> The plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period…will be applied to make payments to unsecured creditors under the plan.

In the 2005 amendments to the Code, Congress replaced the words "three-year" before the word "period" with "applicable commitment." The term "applicable commitment period" is defined in section 1325(b)(4) as 3 years or not less than 5 years. The question of whether the term is a temporal or monetary component has been the subject of much debate. *See In re Fuger*, 347 B.R. 94 (Bankr. D. Utah 2006)*; In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006); *In re McGuire*, 342 B.R. 608 (Bankr. W.D. Mo. 2006).

However, there are cases, such as this one, where debtors have no disposable income pursuant to section 1325(b), in which the applicable commitment period is fundamentally irrelevant to the confirmation of the plan.

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See In re Green, 378 B.R. 30, 34-35 (Bankr. N.D.N.Y. 2007)(if debtor has no unsecured creditors or no projected disposable income then the applicable commitment period has no meaning); *In re Brady,* 361 B.R. 765 (Bankr. D.N.J. 2007); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006). Even under the reading of the statute most favorable to the Trustee, the applicable commitment period represents only a period of time over which debtors must make payments of their disposable income to unsecured creditors. "If there are no unsecured creditors, section 1325(b)(1)(B) is rendered obsolete. Similarly, if there is no projected disposable income to be received, the statute has no more meaning than if there were no creditors to be paid." *Green*, 378 B.R. at 35. Because, in this case, disposable income is less than zero, the time period over which debtor must make payments to unsecured creditors is irrelevant. Instead, the plan duration will be determined by other considerations such as payments to secured creditors.

Additionally, the plain language of the statute does not support an interpretation that equates applicable commitment period with plan duration. Indeed, Congress has specifically referred to the length of a plan in section 1322(d). 11 U.S.C. § 1322(d) ("the plan may not provide for payments over a period that is longer than 3 years, …but the court may not approve a period that is longer than 5 years"). Congress could have stated that the plan length for an above-median debtor is five years regardless of whether the debtor had unsecured

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creditors or disposable income. Instead, Congress tied the applicable commitment period to the payment of disposable income to unsecured creditors. Without unsecured creditors and disposable income the applicable commitment period has no meaning.

B. Artificially extending the chapter 13 plans to 60 months where no dividend is due to unsecured creditors, benefits no one and punishes debtors who spend less than the IRS guidelines permit.

It makes no sense to hold debtors hostage for 60 months where they can satisfy the requirements of section 1325(b)(1)(B) in a shorter period. *In re Fuger*, 347 B.R. at 97. There is simply no benefit to be gained by artificially extending chapter 13 plans. Where the disposable income calculation results in zero or a negative number, the primary effect of stretching out a plan from 36 to 60 months is that the monthly plan payment is reduced. As a result, secured creditors must wait longer to receive payments due to them and suffer a greater risk of nonpayment. Trustees must administer cases for a longer period of time. Debtors must pay more interest to secured creditors under the present value calculation required by section 1325(a)(5)(B)(ii). And the risk that debtors will fail to complete their plans increases significantly because there is additional time in which the debtors may suffer a loss of income or unexpected expenses. Bankruptcy policy should avoid, not require, such consequences.

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Additionally, forcing debtors into a 60-month plan punishes them for spending less than Congress allowed and devoting that savings to the repayment of secured creditors. For example, in this case the IRS guidelines permit Debtor to spend up to $825.00 on food, clothing, household supplies, personal care, and other miscellaneous items. The use the IRS guidelines was an attempt by Congress to set an objective standard for measuring debtors' expenses.[2] 151 Cong. Rec. S1842-43 (March 1, 2005)(statement of Sen. Hatch) ("The means test contained in the bill will provide a uniform standard to bankruptcy judges to evaluate the ability of bankruptcy filers to repay debts."). The trustee essentially seeks to undermine these standards by requiring the debtor to live on less money than the IRS guidelines allow. Here, Schedule J shows that Debtor spends only $575.00 for food, clothing, household supplies, personal care, and other miscellaneous items. The difference of $250 represents funds that the Debtor would otherwise be allowed to spend, but instead has chosen to commit to his plan payments.

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[2] By using fixed, standard amounts for housing, food, transportation, etc., Congress has created an overall reasonable amount for these expenses. Under this framework the debtor may spend a little more on housing and a little less on transportation or food without running afoul of Congressional intent. Each standard expense is not intended to operate independently. Rather adding all the standard expenses together results in the total amount the debtor is permitted to spend in the covered categories.

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The fact that Debtor is making an effort to pay off his creditors more quickly and achieve a fresh start sooner is a decision that should be lauded, not punished.

The funds that Trustee argues should be devoted to plan payments consist largely of funds the Debtor is permitted to spend on items like food and clothing. The Debtor in this case has chosen to skimp on these items in order to more quickly complete his plan and put his finances on track. There is no possible justification for the argument that once he has done this over 48 months he should then devote the money allowed by Congress for food and clothing to pay unsecured creditors for an additional year. If anything, the debtor will need to spend more to "make up" for the needs that went unmet during the three-year plan period.

The Trustee's conclusion that extending the plan to 60-months would produce a 100% dividend to unsecured creditors is also flawed. The underlying assumption is that the debtor's plan payment would be required to stay at $600 per month. If the trustee concedes that disposable income payable to unsecured creditors is determined by Form B22C—which is negative in this case—then the debtor could reduce the amount of the payment, extend the life of the plan for 60

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months, and pay unsecured creditors the same amount. As noted above, such an artificial construction where disposable income is zero or less than zero runs counter to many other goals of the Code.

Here the Debtor's disposable income available to pay unsecured creditors is less than zero. Accordingly, the time period over which the Debtor must make payments for the benefit of unsecured creditors is simply not relevant to confirmation of Debtors' chapter 13 plan.

CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that this Court affirm the decision of the bankruptcy appellate panel.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Counsel for *amicus curiae*, Wendell J. Sherk, is a member of the bar of this Court of Appeals for the Eighth Circuit.

CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 2716 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

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ADDENDUM

A. Excerpt from Chapter 13 Trustee's Brief Submitted to the Bankruptcy Appellate Panel

B. Judge Randolph J. Haines, Chapter 11 May Resolve Some Chapter 13 Issues, Norton Bankruptcy Law Advisor, 2007 No. 8 NRTN-BLA 1 (Aug. 2007).