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SEPTEMBER 30, 2008

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 13
	)	
DANNY L. DEAN,	)	
CATHERINE M. DEAN a/k/a	)	CASE NO. 07-73132-MHM
CATHERINE EYLER,	)	
	)	
Debtors.	)	

ORDER DENYING CONFIRMATION

This case is before the court on confirmation of Debtors' Chapter 13 plan. Objections to confirmation were filed by the Chapter 13 Trustee and by eCast Settlement Corporation ("eCast"). Following the hearing on confirmation, the parties were allowed to file post-hearing briefs. Briefs were filed by Debtors, the Chapter 13 Trustee and eCast.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") requires that a debtor filing a Chapter 13 case complete a calculation known as the "Means Test" by completing Official Form 22C ("22C"). Part I of 22C provides for a calculation of a debtor's Current Monthly Income ("CMI") as an average of all income received during the six months prior to filing. Part II of 22C compares the debtor's CMI to the applicable median family income to determine a debtor's Applicable Commitment Period ("ACP"). If a debtor's CMI is below the applicable median family income, the ACP is 36 months. If a debtor's CMI is above the applicable median family income, the ACP is 60 months. Part IV of 22C provides for a calculation of deductions for expenses. Most of the expenses in Part IV must be calculated based upon the national and local Standards of the Internal Revenue Service ("IRS Standard deductions"), but certain "Other Necessary Expenses" may also be deducted, including payroll taxes, life insurance, childcare, health care, and telecommunication services. Subpart B of Part IV of 22C provides for Additional Expense Deductions, including deductions for educational expenses for dependent children, additional food and clothing expense, and charitable contributions. Part VI of 22C is a calculation of Disposable Income, which is simply a subtraction of the expenses in Part IV from the CMI in Part I.

In addition to 22C, a debtor must file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs (the "Schedules"). 11 U.S.C. § 521. Bankr. Rule 1007. Among those Schedules are *Schedule I - Current Income of Individual Debtor(s)*, and *Schedule J - Current Expenditures of Individual Debtor(s).* The income on Schedule I is the actual projected income and the expenses listed on Schedule J are actual projected expenses. Schedule J concludes with a calculation of monthly net income, formerly known as "disposable income" before BAPCPA, which is simply a subtraction of the expenses on Schedule J from Income on Schedule I.[1]

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[1] The income-minus-expenses calculations on 22C and on Schedules I and J are slightly different because on 22C, the payroll deductions are included in Part IV expenses, whereas payroll deductions are set forth on Schedule I to arrive at net monthly income and all other expenses are listed on Schedule J.

If a debtor's future financial circumstances are expected to remain essentially the same as they have for the six months immediately preceding the bankruptcy filing date, the results of the calculations on 22C and on Schedules I and J may be essentially the same (although often they are different). But if the debtor has experienced a significant change in income or expenses or both at or near the date the petition is filed, the results of the calculations on 22C and on Schedules I and J would likely be significantly different. When a debtor's financial circumstances have not changed significantly at or around the time of the bankruptcy filing, the minor differences between 22C and the Schedules present few problems. When a debtor's financial circumstances *have* changed significantly at or around the time of the bankruptcy filing, however, the differences between 22C and the Schedules can present significant problems of interpretation of the Bankruptcy Code's provisions, especially those most recently promulgated by BAPCPA.

In the instant case, Debtors had experienced an interruption in income during the six months prior to filing their bankruptcy petition. Form 22C showed a CMI of $6,009.66. Their 22C expenses total $8,822.25, resulting in (negative) Disposable Income of -$2,812.59. Both Debtors, however, became fully employed approximately one month prior to their bankruptcy filing, so that Schedule I shows their combined projected monthly gross income is $11,058. Schedule J lists expenses totaling $7,285, which, with the payroll deductions of $3,323 shown on Schedule I, yield total expenses of $10,608 and a net income of $450. Debtors' Chapter 13 plan, as amended, provides for monthly plan payments of $450 for 60 months and for a 12% dividend to unsecured creditors. Timely filed unsecured claims total $100,893.99.

The standards for confirmation of a Chapter 13 plan are found in 11 U.S.C. §1325. Of significance in the instant case are the provisions of §1325(b), which provide:

> (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–
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> (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
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> (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.
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> (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--
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> (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
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> (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; . . .
>
> (3) Amounts reasonably necessary to be expended under 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 . . .

> (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[.]

(emphasis supplied). In the instant case, because objections to confirmation have been filed, Debtors' plan must provide for payment of 100% of the unsecured claims, or Debtors must show they have committed to the plan all their projected disposable income ("PDI") for 60 months.[2]

eCast filed an objection to Debtors' plan and amended plan. eCast holds a substantial portion (79%) of Debtors' unsecured debt. eCast does not, of course, object to Debtors' use of their increased income shown in Schedule I as the basis for calculating their projected disposable income. eCast asserts, however, that, Debtors, as above-median income debtors, *must* calculate their PDI using the Schedule I gross income[3] reduced by the means test expenses shown on 22C.

The Chapter 13 Trustee objected to confirmation of Debtors' plan on several grounds,[4] including objection to an expense item on Schedule J of $1,793.00 for "child care, grooming." Debtors did not include child care as a deduction on 22C. Expenses for "grooming" would, of course, already be included in the standard deduction amounts

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[2] The parties do not dispute that 60 months is the ACP in this case.

[3] As noted above, the "bottom line" figure on Schedule I is a calculation of a debtor's (or joint debtors') gross income minus payroll deductions. The 22C expenses, however, include deductions for those same payroll expenses. Therefore, to avoid a double deduction of payroll expenses, Debtors' Schedule I ***gross*** income is the number from which eCast argues 22C expenses should be deducted.

[4] Most of the Chapter 13 Trustee's objections were cured prior to the confirmation hearing.

on 22C. Unfortunately, no itemization of the "child care, grooming" expenses has been provided by Debtors. Additionally, the Chapter 13 Trustee questions the accuracy and adequacy of expense items relating to Debtors' residential real estate, including, principally, taxes and insurance.

Debtors' Schedule J also provides various information about expenses associated with Debtors' ownership of their residence. Debtors show that their monthly mortgage payment is $2,600, not including taxes or insurance. That Debtors' mortgagee does not require escrow of taxes and insurance appears unlikely,[5] but no itemization regarding the mortgage payment, insurance or real estate taxes has been provided by Debtors. Debtors list an expense of $189 for "Mortgage insurance," which is ambiguous[6] and lists $66 for homeowners' insurance. Debtors list only $26 per month for "property" taxes, which it may be assumed refers to real estate *ad valorem* taxes, but $312 would appear to be a woefully inadequate sum to provide for payment of annual real estate taxes on residential real estate valued at $315,000.

Because Debtors' plan does not propose to pay 100% of the unsecured claims, Debtors must show they have committed to the plan all their PDI for 60 months. Although the Bankruptcy Code provides detailed definitions of "disposable income" and

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[5] Debtors' Schedule A values the real estate at $315,000 with an outstanding mortgage of $303,883.80.

[6] Property and casualty insurance is not generally describe as "Mortgage insurance," which is a term that could imply credit-default insurance, such as MGIC.

"current monthly income," the Code does not define the term "projected disposable income," or provide any clear guidance about how PDI may differ from "disposable income." Numerous court opinions have addressed the meaning of PDI and the results are split. One group of cases views PDI as simply the disposable income number as calculated on 22C multiplied by the ACP. *Maney v. Kagenveama*, __ F. 3d. __, 2008 WL 2485570 (9th Cir. 2008); *Coop v. Fredrickson*, 375 B.R. 829 (8th Cir. BAP 2007); *In re Barr,* 341 B.R. 181 (Bankr. M.D. N.C. 2006); *In re Alexander,* 344 B.R. 742 (Bankr. E.D. N.C. 2006); *In re Berger,* 376 B.R. 42 (Bankr. M.D. Ga. 2007); *In re Kolb,* 366 B.R 802 (Bankr. S.D. Ohio 2007). Those opinions espouse the view that Congress created a set of bright line rules intended to be applied narrowly and rigidly without regard to inequitable consequences either to debtors or creditors from such rigid application.

Another group of cases recognizes that the addition of the term "projected" to the defined term "disposable income" signals more than a simple mathematical calculation. *Kibbe v. Sumski*, 361 B.R. 302 (1st Cir. BAP); *In re Arsenault*, 370 B.R. 845 (Bankr. M.D. Fla. 2007); *In re French*, 383 B.R. 402 (Bankr. W.D. Ky. 2008); *In re Grady*, 343 B.R. 747 (Bankr. N.D. Ga. 2006)(J. Mullins); *In re Clemons,* Case No. 05-85163 (Bankr. N.D. Ga., June 1, 2006) (J. Massey); *In re Purdy*, 373 B.R. 142 (Bankr. N.D. Fla. 2007); *In re Thample,* 390 B.R. 716 (Bankr. D. Kan. 2008). Elsewhere in Chapter 13, Congress has provided for flexibility to deal with changes in a debtor's circumstances, including the provisions allowing for post-confirmation modification of a debtor's plan. It seems unlikely that Congress intended preconfirmation inflexibility, with the result that bankruptcy relief could be denied to certain debtors, thereby insuring that creditors would be paid, if at all, unevenly, depending on the usual race to the courthouse: *for example*, an above-median income debtor, *i.e.*, a debtor ineligible to seek relief under Chapter 7, who suffered a significant decrease in income at or near the filing date, by loss of job or income resulting from illness, could be denied relief because s/he would be unable to afford the plan payment resulting from a disposable income calculation on 22C.[7] In such a circumstance, chaos rules: debtors are denied the opportunity to pay creditors in an orderly fashion,[8] and creditors are left with various, but more expensive collection options.[9]

The rigid application of the rules set forth in §1325 would undermine one of the primary purposes of BAPCPA, so important that it is contained in the title: "bankruptcy abuse prevention." Viewing the provisions in §1325(b) as bright lines rules requiring application without consideration of any changes in circumstances would actually allow

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[7] Feasibility is a requirement for confirmation. If a debtor's Schedules I and J show that a debtor lacks actual income sufficient to make the plan payment, lack of feasibility will result in denial of confirmation.

[8] The three Standing Trustees of the Northern District of Georgia (Adam Goodman, Mary Ida Townsend, and Nancy Whaley) paid out $153+ million to creditors in Chapter 13 proceedings in 2007. *See www.usdoj.gov/ust/eo/private_trustee/library/chapter13/index.htm.*

[9] Georgia is one of the states which allow wage garnishment, but individual creditors also have their contractual and state court processes leading to recovery by lien or levy.

more, rather than less, abuse of the Bankruptcy Code, as debtors could schedule their bankruptcy filing to keep their increased income and deprive creditors of a share in that income. For example, debtors who had an interruption in income that prompted the use of credit cards and other unsecured credit for living expenses could time their bankruptcy filing so that their CMI would be substantially lower than their actual increased postpetition income. If their expenses remained the same, the unsecured creditors who had supported such debtors during the income interruptions could be deprived of any share in the increased income. On the other hand, the addition of the term "projected" permits the court to consider and adjust income and expense calculations to satisfy the dual purposes of bankruptcy – a fresh start for a debtor and an assured and fair distribution to creditors. The line of cases finding that PDI is a forward-looking term, permitting adjustment based upon actual income to be received by a debtor, is persuasive. The burden of proof remains on a debtor to document increases or decreases in income between 22C and Schedule I.

Court opinions regarding the computation of expenses in connection with PDI are less numerous than the income-focused opinions, and opinions in which the facts mirror the facts in the instant case are practically non-existent. The language of §1325(b)(3)(B) regarding the computation of expenses to reach PDI, however, is much more explicit: for above-median-income debtors, such as those in the instant case, "amounts reasonably necessary to be expended . . . ***shall*** be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)," *i.e.*, Part IV of the 22C expenses (emphasis supplied). "Shall" is universally viewed as a signal of a mandatory instruction. *See In re Hughey,* 380 B.R. 102 (Bankr. S.D. Fla. 2007); *In re Meek*, 370 B.R. 294 (Bankr. D. Idaho 2007) (and cases cited therein); *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wisc. 2006); *In re Johnson,* 346 B.R. 256 (Bankr. S.D. Ga. 2006). Little case law is found to suggest that the mandatory nature of §1325(b)(3) can be ignored, and those cases are not persuasive.

In the instant case, Debtors' postpetition income increased and their expenses also increased. Debtors have two children under the age of five years. It is reasonable that, when both Debtors achieved full employment, they would incur expenses for child care. Debtors, however, failed to include that child care expense on 22C. Although CMI is an historical figure, based upon the six months immediately prepetition, the instructions about computation of 22C expenses are not relegated to a similar historical perspective, nor do they appear to be intended only as a snapshot of a debtor's expenses on the petition date, prohibiting inclusion of expenses the debtor can reasonably anticipate will be incurred postpetition. Also, the expense calculations on 22C can be amended postpetition to reflect changed circumstances.

Debtors have not provided sufficient information regarding the differences in Schedule J and 22C expenses. As a result, an accurate extrapolation of the expenses from Schedule J and 22C to reach an accurate figure with which to compute Debtors'

PDI is not possible. Thus, based upon the information currently of record, confirmation is not possible. Debtors will, however, be accorded an opportunity to file an amended 22C to accurately and completely reflect their projected expenses; therefore, it is hereby

ORDERED that confirmation is ***denied***. Within 20 days of the date of entry of this order, Debtors may file an amended 22C to accurately and completely reflect Debtors' projected expenses.[10] If said amendment is filed within the time allowed, confirmation hearing will be continued and rescheduled. At the continued confirmation hearing, Debtors must be prepared to present evidence to support the expenses for childcare and their residential real estate tax and insurance expenses. If no amendment is filed within the time allowed, this case may be dismissed without further notice or hearing.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtors, counsel for Debtors, counsel for eCast Settlement, the Chapter 13 Trustee, and all creditors and parties in interest.

IT IS SO ORDERED, this the 30th day of September, 2008.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

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[10] and, if appropriate, an amended Schedule I and/or J.