

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman**

In re:)
)
JAY HARRISON KING and) **Case No. 10-18139 HRT**
KAREN DENISE KING,) **Chapter 13**
)
Debtors.)
_____)

ORDER ON CHAPTER 13 TRUSTEE’S OBJECTION TO DEBTORS’ PLAN

This case comes before the Court on the Debtors’ Amended Chapter 13 Plan (docket #21) and the Chapter 13 Trustee’s Objection to Confirmation of Chapter 13 Plan (docket #26). After a hearing on July 28, 2010, at which the parties addressed the narrow issue of the applicable commitment period in this case, the Court took the matter under advisement. The Court is now prepared to rule, and hereby finds and concludes as follows.

Debtors Jay Harrison King and Karen Denise King filed their Chapter 13 petition on April 9, 2010. Their Schedules I and J show a positive net income of \$350.74, but when calculated under 11 U.S.C. § 1325(b)(2), their monthly disposable income is negative \$212.33. Their current monthly income is above the applicable median family income. Their Amended Chapter 13 plan (the “Plan”) proposes to pay \$350 per month for 44 months. The Plan does not propose to pay all unsecured creditors in full. The Chapter 13 Trustee objected to confirmation of the Plan, arguing that the Debtors are required to propose a 60 month plan under 11 U.S.C. § 1325(b), which provides, in relevant part, as follows:

(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--

. . . .
(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.

. . . .
(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--
[the applicable median family income]; 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.

11 U.S.C. § 1325(b).

The Trustee argues that the term “applicable commitment period” specifies a period of time for which the Debtors must commit to repayment of their debts in bankruptcy, a mandatory minimum length of a Chapter 13 plan. The Trustee argues that in this case, because the Debtors are above-median-income debtors, their applicable commitment period is 60 months, and the Court cannot confirm a plan for a shorter period of time unless the plan provides for payment in full of all allowed unsecured claims. The Trustee’s argument is supported by recent cases from this district, including *In re Wing*, No 10-18171-MER, 2010 WL 3522260 (Bankr. D. Colo. Sept. 9, 2010) (Judge Romero), and *In re Brown*, 396 B.R. 551 (Bankr. D. Colo. 2008) (Judge Campbell), and from across the country, *see, e.g., In re Tennyson*, 611 F.3d 873, 875 (11th Cir. 2010); *In re Frederickson*, 545 F.3d 652 (8th Cir. 2008); *In re Fridley*, 380 B.R. 538 (9th Cir. BAP 2007).

The Debtors argue that the term “applicable commitment period” is used as a multiplier to determine the amount of projected disposable income that must be paid into a Chapter 13 plan. In this case, where the Debtors’ Form 22C shows negative projected disposable income, that negative amount multiplied by any number of months is still a negative number. Thus, the Debtors argue, there is no applicable period of time for which they must pay disposable income, and they can fulfill the requirements of confirmation without having to remain in bankruptcy for 60 months. The Debtors’ argument is supported by a case from this district, *see In re Williams*, 394 B.R. 550 (Bankr. D. Colo. 2008) (Judge Brown), and cases from other districts as well, *see, e.g., In re Brady*, 361 B.R. 765 (Bankr. D.N.J. 2007).

Each argument is supported by well-reasoned decisions, but on balance the Court finds the Trustee’s argument, and the cases supporting it, more persuasive. While courts or parties applying § 1325(b) often, as a practical matter, multiply projected disposable income by either 36 or 60 to calculate the total amount of money that must be paid into a Chapter 13 plan, such multiplication is a gloss that should not replace the actual language of the statute. Section 1325(b)(1)(B) does not state that projected disposable income should be multiplied by the number 36 or 60; it states that projected disposable income should be “committed” for a “period,” which § 1325(b)(4) defines as either “3 years” or “5 years.”

Specifically, § 1325(b)(4)(A)(ii) provides for an “applicable commitment period” of “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 [the applicable median family income].” In the same section, Congress uses “5 years” and “multiplied by 12.” The Court assumes that Congress’s choice of words was intentional, and that “5 years” means something different than “multiplied

by 60.” See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (it must be assumed that “Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another”) (quoting *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994)). Interpreting § 1325(b) as requiring a time commitment, rather than just a monetary amount, best gives effect to the terms “commitment period” and “years” included in the statute. See *Negonsott v. Samuels*, 507 U.S. 99, 106 (1993) (in its interpretation of a statute, a court must give meaning and import to every word in the statute).

The legislative history of B.A.P.C.P.A. supports the conclusion that Congress intended the term “applicable commitment period” to describe plan duration. See H.R. Rep. 109-31(I), p. 79, 2005 U.S.C.C.A.N. 88, 146. In particular, the use of the words “5-year duration” in the section heading indicates Congress’s intent to provide for a temporal period, rather than a simple multiplier.

The Court also looks to past bankruptcy practice. Before B.A.P.C.P.A., § 1325(b)(1)(B) required that a plan provide “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.” Courts construed that provision as a temporal minimum, at least at the time of confirmation, when an objection was filed. While there was some debate about whether a debtor could modify an already-confirmed plan to provide for a payment term of less than three years, compare *In re Sunahara*, 326 B.R. 768 (9th Cir. BAP 2005) (allowing such modification), with *In re Guentert*, 206 B.R. 958 (Bankr. W.D. Mo. 1997) (prohibiting such modification), in each case the courts recognized the three-year commitment as an initial confirmation requirement. See *In re Slusher*, 359 B.R. 290, 303 (Bankr. D. Nev. 2007). Congress’s change, in B.A.P.C.P.A., from “three-year period” to “applicable commitment period” does not indicate a desire to abandon a temporal minimum. “We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.” *In re Lanning*, 130 S.Ct. 2464, 2473 (2010) (internal citation and quotation omitted).

The stated goal of B.A.P.C.P.A. further supports the conclusion that Congress intended to require certain debtors to remain in bankruptcy for certain minimum periods of time. “The heart of [B.A.P.C.P.A.’s] consumer bankruptcy reforms . . . is intended to ensure that debtors repay creditors the maximum they can afford.” H.R. Rep. 109-31(I), p. 2, 2005 U.S.C.C.A.N. 88, 89. Requiring a 60-month time commitment of above-median-income debtors, where an objection is filed and the debtors are unable to pay their unsecured creditors in full, increases the amount of time during which debtors are subject to the supervision of the Court. During that time, the Chapter 13 Trustee or any party in interest can request and obtain copies of the debtor’s post-petition tax returns, see 11 U.S.C. § 521(f)(1), and annual income and expense reports, see § 521(f)(4). If a debtor’s income increases or expenses decrease, thereby making more money available for Chapter 13 plan payments, a Chapter 13 Trustee or a creditor may request plan

modification under § 1329. Together, those sections best ensure that debtors repay the maximum they can afford over the course of their Chapter 13 bankruptcy case.

Finally, the Court notes that when the *Lanning* Court quoted § 1325(b)(1)(B), it did so as follows:

[Section] 1325 provides that if a trustee or an unsecured creditor objects to a Chapter 13 debtor's plan, a bankruptcy court may not approve the plan unless it provides for the full repayment of unsecured claims or "provides that all of the debtor's projected disposable income to be received" over the duration of the plan "will be applied to make payments" in accordance with the terms of the plan. 11 U.S.C. § 1325(b)(1).

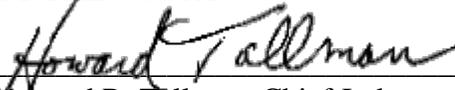
In re Lanning, 130 S.Ct. at 2469. It is interesting that the *Lanning* Court replaced "in the applicable commitment period" with "over the duration of the plan." That language indicates that the *Lanning* Court viewed the section as specifying a plan duration, although that specific question was not before the *Lanning* Court.

In conclusion, the Court finds that Trustee has the better argument. Section 1325(b)'s "applicable commitment period" requires not only the commitment of an amount of money but also the commitment of an amount of time. Here, because the Debtors are above-median-income debtors, they must propose a 60-month plan, unless they are able to pay their unsecured creditors in full over a shorter period. Their Plan, as currently proposed, cannot be confirmed. Accordingly, it is

HEREBY ORDERED that confirmation of the Debtors' plan is DENIED. The Debtors must file an amended plan within fourteen (14) days of the date of this Order, failing which their case will be dismissed without further notice or hearing.

Dated this 27th day of October, 2010.

BY THE COURT:



Howard R. Tallman, Chief Judge
United States Bankruptcy Court