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Having Your Cake and Eating It Too: Why Voluntary Post-Petition 401(k) Contributions Are Disposable Income

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HAVING YOUR CAKE AND EATING IT TOO: WHY VOLUNTARY POST-PETITION 401(k) CONTRIBUTIONS ARE DISPOSABLE INCOME

ABSTRACT

Following the 2005 amendments to the Bankruptcy Code, the majority of chapter 13 debtors have been successful in minimizing their repayment obligations to creditors while bolstering their financial stability during retirement. The Bankruptcy Code allows chapter 13 debtors to retain their assets and repay their debts to creditors using their earned income. Alternatively, debtors may simply avoid some of the liability by dedicating a portion of their earned income for reasonably necessary expenses. Judicial inconsistencies have emerged concerning whether voluntary post-petition 401(k) retirement contributions for chapter 13 debtors constitute disposable income in accordance with Sections 541(b)(7) and 1325(b) of the Bankruptcy Code.

A majority of courts follow the Johnson approach, whereby all post-petition 401(k) contributions are excluded from a debtor's disposable income, and therefore out of reach for creditors. Other bankruptcy courts follow the Prigge approach, whereby post-petition 401(k) contributions are included as disposable income available to creditors. Still other courts follow the Seafort approach, whereby post-petition 401(k) contributions are excluded from disposable income only if such contributions were made pre-petition.

This Comment argues that excluding post-petition 401(k) contributions from the debtor's disposable income available to creditors—the approach followed by most courts—undermines the "fresh start" goal of consumer bankruptcy. After highlighting the shortcomings of the current post-petition 401(k) contribution analysis, this Comment suggests that there lies a strong argument for including post-petition 401(k) contributions in a debtor's disposable income, thereby curbing the opportunity for abuse and restoring the balance between debtors and creditors.

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INTRODUCTION

Allowing a debtor to deduct her voluntary post-petition 401(k) contributions from the disposable income available to her creditors under her chapter 13 repayment plan creates an opportunity for abuse. The facts in *Davis v. Helbling* (*In re Davis*) illustrate this point:

In 2017, Camille Davis filed a chapter 13 bankruptcy petition in Ohio after accumulating over $200,000 in debt.[1] Davis' chapter 13 petition allowed her to satisfy her unsecured debts—totaling around $189,000—by agreeing to pay all of her disposable income to her unsecured creditors over a five-year period.[2] Davis committed to a plan that would pay her creditors $19,380, approximately ten percent of the $189,000 of her accrued debt.[3] Of Davis's $5,627 in gross monthly income, she designated $323 as disposable income available to her creditors.[4] In making her calculation, Davis set aside $220 of her gross monthly income to contribute to her 401(k) plan.[5]

Under the view of most courts,[6] allowing Davis to shield an additional forty percent of the amount she *could* have paid her creditors, is acceptable.[7] While Davis gets quite the windfall, her creditors are left with only ten cents for every dollar they are owed.[8] Considering the stakes, this windfall is exactly the kind of abuse that the Bankruptcy Code ought to prevent. Yet the treatment of post-

1 Davis v. Helbling (*In re* Davis), 960 F.3d 346, 349 (6th Cir. 2020).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *See In re* Gibson, 2009 LEXIS 2524, at *5 (Bankr. D. Idaho Aug. 31, 2009); *In re* Mati, 390 B.R. 11, 15–17 (Bankr. D. Mass. 2008); *In re* Devilliers, 358 B.R. 849, 864–65 (Bankr. E.D. La. 2007); *In re* Leahy, 370 B.R. 620, 623–24 (Bankr. D. Vt. 2007); *In re* Shelton, 370 B.R. 861, 864–66 (Bankr. N.D. Ga. 2007); *In re* Nowlin, 366 B.R. 670, 676 (Bankr. S.D. Tex. 2007); *In re* Njuguna, 357 B.R. 689, 690–91 (Bankr. D. N.H. 2006).

7 Had the court determined that the post-petition 401(k) contributions were disposable income, Davis' creditors would have received $32,580 of the $189,000 in accrued debt—totaling approximately seventeen cents for every dollar owed. *Davis*, 960 F.3d at 346.

8 *Id.* at 364–65 (Readler, J., dissenting). The dissent argued the majority opinion allowed debtors to shield forty percent of the amount to be paid to creditors and further stated:

> [t]hat is not to say [the debtor] could never save for retirement, even in a post-petition [c]hapter 13 repayment setting. Were her monthly living expenses to fall below the over $5,000 budgeted for those expenses, she could invest the difference in a 401(k) or another forward-looking investment device. But at least for a three-to-five-year period, Congress curbed [the debtor] from having her cake (over $5,000 for monthly living expenses) and eating it too (contributing $220 to a 401(k) over and above her monthly living expenses).

Id. (Readler, J., dissenting).

petition 401(k) contributions in chapter 13 bankruptcy remains unpredictable and confusing.[9]

This Comment argues that the majority approach which permits the exclusion of voluntary post-petition 401(k) contributions from disposable income in chapter 13 cases unfairly incentivizes debtors to prioritize their retirement needs and benefit their own future financial standing, rather than repaying the creditors of their accrued debts. In 2017, the number of individuals who filed a chapter 13 petition almost reached the number of civil and criminal cases filed in federal district courts that same year.[10] The Internal Revenue Code provides some clarity as to whether voluntary post-petition 401(k) contributions constitute disposable income.[11] Despite intersecting with the Internal Revenue Code at times, the Bankruptcy Code's language regarding the issue remains unclear.[12]

Individual debtors seeking relief may file under chapter 7 or chapter 13, depending on their financial circumstances. Because chapter 7 and chapter 13 differ in their processes, implications, and obligations, debtors must weigh the advantages and disadvantages of these two avenues before filing for bankruptcy relief. For example, the chapter 7 process liquidates the debtor's property to repay creditors. On the other hand, when filing under chapter 13, the debtor retains their assets and proposes a plan to the court to repay their creditors using her future earned income.[13]

For the court to approve a debtor's chapter 13 plan proposal, "*all of the debtor's projected disposable income*" must be applied toward payments to creditors.[14] Section 1325(b)(2) excludes "amounts reasonably necessary . . . for the maintenance or support of the debtor" from the debtor's projected amount of disposable income.[15] Before Congress passed the Bankruptcy Abuse Prevention

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[9] *See, e.g.*, *In re* Egan, 458 B.R. 836, 843–44 (Bankr. E.D. Pa. 2011) (listing various approaches); *In re* McCullers, 451 B.R. 498, 501 (Bankr. N.D. Cal. 2011) (same).

[10] In 2017, the total number of business and nonbusiness chapter 13 cases was 294,637. U.S. CTS., *Table F-2: Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2017* 1, 1 (2018) (available at https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_1231.2017.pdf). In 2017, 344,787 civil and criminal cases were filed in federal court. U.S. CTS., *Statistics Div., Admin. Office of U.S. Courts, Judicial Business of the United States Courts: 2017 Annual Report of the Director* 1,1 (2018) (available at https://www.uscourts.gov/statistics-reports/judicial-business-2017).

[11] "[A]ttempt[s] to advise taxpayers that contributions to voluntary retirement plans are not a necessary expense." IRM § 5.15.1.28 (Aug. 29, 2018); *see In re* Lenton, 358 B.R. 651, 658 (Bankr. E.D. Penn. 2006).

[12] *See In re* Trejos, 352 B.R. 249, 253–54 (Bankr. D. Nev. 2006).

[13] 11 U.S.C. § 1322 (2018).

[14] *Id.* § 1325(b)(1)(B) (emphasis added).

[15] *Id.* § 1325(b)(2).

and Consumer Protection Act of 2005 ("BAPCPA"),[16] bankruptcy courts held that post-petition contributions were part of a debtor's disposable income and were not eligible for exemption as a reasonably necessary expense for a debtor's maintenance.[17]

However, the addition of Section 541(b)(7) caused confusion among bankruptcy courts and resulted in inconsistent treatment of post-petition contributions.[18] Section 541(b)(7) excludes amounts "withheld by an employer from the wages of employees for payment as contributions" to a 401(k) retirement plan from the property of the estate.[19] The confusion is caused by a provision included under Section 541(b)(7)(A)(i)(III), which reads "except that such amount under this subparagraph shall not constitute disposable income as defined in [S]ection 1325(b)(2)."[20] Addressed in *Davis v. Helbling* (*In re Davis*), this uncertainty concerns whether debtors like Davis should be permitted to exclude 401(k) contributions from the disposable income available to creditors based on the language of Sections 541(b)(7) and 1325(b)(2) of the Bankruptcy Code.[21] In attempting to resolve this issue, courts disagree on matters such as statutory interpretation, policy objectives, and whether debtors should be allowed to ease their repayment commitments while securing their future retirement plans.

Part I of this Comment introduces the relevant provisions of the Bankruptcy Code and shows that Congress used BAPCPA to further its intent to curb abuse of the Bankruptcy Code. Part II illustrates the effect of BAPCPA on the treatment of post-petition 401(k) contributions and describes the different judicial analytical frameworks that have emerged as a result. Part III explains how shielding 401(k) contributions from creditors invites abuse and gives Code

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16 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

17 *See In re* Johnson, 241 B.R. 394, 399 (Bankr. E.D. Tex. 1999); *In re* Austin, 299 B.R. 482, 486–87 (Bankr. E.D. Tenn. 2003); *In re* Keating, 298 B.R. 104, 110 (Bankr. E.D. Mich. 2003); *In re* Regan, 269 B.R. 693, 697 (Bankr. W.D. Mo. 2001); *In re* Merrill, 255 B.R. 320, 323–24 (Bankr. D. Or. 2000); *In re* Cox, 249 B.R. 29, 32 (Bankr. N.D. Fla. 2000); *In re* Cohen, 246 B.R. 658, 666–67 (Bankr. D. Colo. 2000); *In re* Hansen, 244 B.R. 799, 802 (Bankr. N.D. Ill. 2000); *see also* Anes v. Dehart (*In re* Anes), 195 F.3d 177, 180–81 (3d Cir. 1999); Harshbarger v. Pees (*In re* Harshbarger), 66 F.3d 775, 777 (6th Cir. 1995).

18 *Compare* Baxter v. Johnson (*In re* Johnson), 346 B.R. 256 (Bankr. S.D. Ga. 2006), *with In re* Prigge, 441 B.R. 667, 679 (Bankr. D. Mont. 2010), *and* Seafort v. Burden (*In re* Seafort), 669 F.3d 662, 663 (6th Cir. 2012).

19 11 U.S.C. § 541(b)(7)(A).

20 *Id.*

21 Davis v. Helbling (*In re* Davis), 960 F.3d 346, 351 (6th Cir. 2020) (citing 11 U.S.C. §§ 541(b)(7)(A)(i)(I), 1325(b)(2)).

support the conclusion that post-petition 401(k) contributions should be included in a debtor's disposable income.

I. DISPOSABLE INCOME DEFINED—AN OVERVIEW OF §§ 1325(B) AND 541(B)(7)

The crux of the issue of whether a debtor may deduct voluntary post-petition 401(k) contributions from a chapter 13 plan lies in the language of Section 541(b)(7)[22] when read with the Bankruptcy Code's definition of "disposable income" in Section 1325(b)(2).[23] The proper assessment of disposable income is a crucial determination in all consumer bankruptcy proceedings because the court will not confirm a debtor's proposed chapter 13 plan without a commitment of "all of the debtor's projected disposable income" to repay creditors.[24] Therefore, having a firm understanding of how to calculate disposable income is imperative for, not only chapter 13 debtors, but also trustees and bankruptcy judges.

BAPCPA modified the method used by bankruptcy courts when determining disposable income, particularly for debtors with above-median incomes.[25] Under BAPCPA, above-median debtors must weather the "means test" under Section 707(b)(2).[26] Before confirming a plan, courts use the chapter 7 means test to assess whether specific deducted expenses constitute abuse.[27] Section 707(b)(2) makes no mention of post-petition retirement contributions. However, BAPCPA's addition of Section 541(b)(7) to the Bankruptcy Code—which mentions post-petition retirement contributions—provides little clarity on the issue of withholding 401(k) contribution from a debtor's disposable income.[28]

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[22] Section 541(b)(7) provides that "[p]roperty of the estate does not include . . . any amount withheld by an employer from the wages of employees for payment as contributions to [a 401(k)-retirement plan] . . . except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)." 11 U.S.C. § 541(b)(7).

[23] "Disposable Income" includes the "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor." *Id.* § 1325(b)(2) (2018).

[24] *Id.* § 1325(b)(1)(B).

[25] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(h)(2), 119 Stat. 23, 33–34 (2005) (codified as amended at 11 U.S.C. § 1325(b) (2005)). The language of Section 1325(b)(2) still applies to chapter 13 debtors with below-median income. 11 U.S.C. § 1325(b)(3) (2018); *see* U.S. CTS., *Instructions for the Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income, Official Forms 22C–1 and 22C–2* (2014) (available at https://www.uscourts.gov/sites/default/files/b_22c-1_instructions.pdf).

[26] 11 U.S.C. § 707(b)(1).

[27] *Id.* § 707(b)(2).

[28] *Id.* § 541(b)(7)(A)(i)(I).

Part I contextualizes these Bankruptcy Code sections within BAPCPA to provide a basis for determining whether voluntary post-petition 401(k) contributions are disposable income in a chapter 13 plan. Part I.A describes the language of Section 1325(b)(2) and the treatment of post-petition 401(k) contributions pre-BAPCPA. Part I.B addresses the legislative history of BAPCPA and the means test under Section 707(b)(2). Part I.C analyzes discrepancies between Sections 1325(b)(2) and 541(b)(7). Part I.D explores the mechanics of the 401(k)-employer contribution plan. Finally, Part I.E examines the intersection between the Internal Revenue Service ("IRS") Standards and the Bankruptcy Code.

A. The Language of 11 U.S.C. Section 1325(b)(2)

Chapter 13 allows individual debtors to retain their property instead of liquidating their assets to satisfy debts.[29] Debtors must propose a plan using their future income to repay creditors.[30] Under the plan, if confirmed, all of an individual debtor's disposable income will be paid to unsecured creditors.[31] The judge determines the plan's feasibility at a confirmation hearing and looks to ensure that the plan adheres to statutory requirements.[32] Creditors have the right to object to provisions of the debtor's plan.[33] Following plan approval, a debtor's disposable income is distributed to his creditors by the trustee.[34] A debtor's "disposable income" is defined under Section 1325(b)(2) as the "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor."[35] For debtors with income greater than the median, Section 1325(b)(3) states that the "amounts

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[29] A chapter 7 bankruptcy involves liquidating the assets of an individual debtor and using the proceeds from the liquidation for creditor repayment. DEBTOR-CREDITOR LAW § 34.10 at 4 (Theodore Eisenberg ed., 2017). The chapter 13 process is more akin to a chapter 11 reorganization. 8 COLLIER ON BANKRUPTCY ¶ 1300.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2021).

[30] 11 U.S.C. §§ 1321, 1325(b)(1)(B) (2018).

[31] If the trustee objects to the debtor's plan proposal, under Section 1325(b)(1), a bankruptcy plan cannot be approved 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.'" 11 U.S.C. § 1325(b)(1)(B) (2018); *see* Hamilton v. Lanning, 560 U.S. 505, 508 (2010).

[32] U.S. CTS., *Chapter 13 - Bankruptcy Basics*, (available at http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics) (last visited Oct. 25, 2020).

[33] *Id.*

[34] 11 U.S.C. § 1325(b)(1)(B) (2018); U.S. CTS., *Chapter 13 - Bankruptcy Basics*, (available at http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics) (last visited Oct. 25, 2020); *see Hamilton*, 560 U.S. at 509.

[35] 11 U.S.C. § 1325(b)(2)(A)(i) (2018).

reasonably necessary to be expended"[36] are "specified under the National Standards and Local Standards . . . issued by the Internal Revenue Service."[37]

While the Bankruptcy Code does not explicitly define "projected disposable income," the Supreme Court clarified the language of Section 1325(b)(1) in *Hamilton v. Lanning*.[38] The Supreme Court held that "when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation."[39] Therefore, calculating a debtor's "projected disposable income" is a two-step inquiry.[40] First, the court applies the formula set forth in Section 1325(b)(2) to calculate the debtor's disposable income; second, the court factors in adjustments for known or virtually known changes in the debtor's income.[41]

The Bankruptcy Amendments and Federal Judgeship Act of 1984 added Section 1325(b) to the Bankruptcy Code.[42] The most significant revision of Section 1325 was the requirement that for court confirmation, a debtor must pay *all* of their disposable income from the applicable commitment period to the plan.[43] The Senate Committee on the Judiciary sought to address the "vague and uncertain standards" of Section 1325 because "it [was] necessary to have a definite standard delineating how much of the debtor's future income should be committed to the plan."[44] However, Congress declined the opportunity to establish such a standard, and instead contended that "[t]he courts may be expected to determine norms" for the maintenance of a debtor and his family.[45]

The Senate Committee on the Judiciary acknowledged that chapter 13 relief "may require some sacrifices by the debtor, and some alteration in prepetition consumption levels."[46] The Committee first prioritized "the debtor's obligations

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36 *Id.* § 1325(b)(3) (2018).

37 *Id.* § 707(b)(2) (2018).

38 *Hamilton*, 560 U.S. at 524.

39 *Id.*

40 *Id.*

41 *Id.* at 519.

42 *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 317(3), 98 Stat. 333, 356 (1984) (codified as amended at 11 U.S.C. § 1325(b)).

43 11 U.S.C. § 1325(b)(2)(B) (2018). Pre-BAPCPA, disposable income only had to be allocated to the plan in general, whereas post-BAPCPA, the plan's disposable income must be solely allocated to unsecured creditors. WILLIAM L. NORTON, JR. & WILLIAM L. NORTON, III, 7 NORTON BANKR. L. & PRAC. § 151:22 (3d ed. 2008).

44 S. REP. NO. 98–65, at 21 (1983).

45 *Id.* at 22.

46 *Id.*

to support himself and his family" when calculating the amount of disposable income for plan contribution.[47] The Committee also emphasized the need for a debtor to attempt to repay their debts to the best of their abilities, and that the "repayment of debt should take precedence over expenses for non-necessary or luxury items."[48] Although Congress gave deference to the courts to determine a definite standard, such a standard never materialized.[49] Instead, using some of Section 1325(b)'s legislative history, courts decided whether post-petition retirement contributions were reasonably necessary on a case-by-case basis.[50]

B. BAPCPA: Its Legislative History and the Means Test under § 707(b)(2)

Congress enacted BAPCPA as a response to concerns that consumer debtors were abusing the Bankruptcy Code to discharge debts under chapter 7 they could have paid under chapter 13.[51] After BAPCA came into effect, qualifying for chapter 7 relief became more difficult for debtors.[52] BAPCPA encourages debtors to enter into a chapter 13 reorganization—where debts are repaid out of future income over a period of three to five years—rather than a chapter 7 liquidation, where debts are repaid out of current assets.[53] This goal was reflected in Section 707(b)(2)'s creation of the means test, which equipped bankruptcy courts with the ability to dismiss a chapter 7 case if the court determined the debtor's income was higher than a statutorily allowed amount.[54]

Chapter 7 allows individual debtors to repay their creditors with proceeds generated from the liquidation of their surrendered, nonexempt property.[55] Chapter 7 releases the debtor from their debt obligations and does not require debtors to satisfy any remaining debts with future income. There were over

47 *Id.* at 21.

48 *Id.* (citing Transamerica Fin. Servs., Inc. v. Stollenwerck (*In re* Stollenwerck), 8 B.R. 297 (M.D. Ala. 1981)).

49 *See, e.g.*, *In re* Guild, 269 B.R. 470, 473–74 (Bankr. D. Mass. 2001) (declining to adopt a per se rule excluding retirement loan repayments from disposable income because of the inherent unfairness).

50 *E.g.*, Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 65 (2011) ("[T]he pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis . . . led to varying and often inconsistent determinations.").

51 *See* H.R. REP. NO. 109-31, pt. 1, at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 90–91; *see also Bankruptcy Reform: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 27 (2005) (statement of Sen. John Cornyn).

52 *See* Ed Flynn & Phil Crewson, *Data Show Trends in Post-BAPCPA Bankruptcy Filings*, BANKRUPTCY BY THE NUMBERS (July 1, 2008), https://www.justice.gov/archive/ust/articles/docs/2008/abi_200808.pdf.

53 ELIZABETH WARREN, ET AL., THE LAW OF DEBTORS AND CREDITORS 253 (7th ed. 2014).

54 11 U.S.C. § 707(b)(2)(A)(i)(I)–(II) (2018).

55 Property eligible for exemption varies widely—examples include a debtor's residence, jewelry, professional tools, and one motor vehicle. WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, 3 NORTON BANKR. L. & PRAC., app. § 56-C:2 (3d ed. 2008) (citing 11 U.S.C. § 522).

double the number of chapter 7 filings as there were chapter 13 filings from September 2019 to September 2020.[56] Debtors may prefer chapter 7 because they do not have to use their future income to pay creditors and may have little nonexempt property to be surrendered and liquidated.

Section 707(b) limited chapter 7 eligibility to "only those debtors truly in need of relief, thereby helping to preserve the integrity of the process."[57] Section 707(b) provides that the court may dismiss a case filed by an individual consumer debtor if the court finds that granting a discharge would be an abuse of the Bankruptcy Code.[58] However, the Bankruptcy Code fails to define "abuse," leaving the courts to interpret the definition.

The means test provides that abuse exists if the debtor's monthly income multiplied by sixty is more than: (1) a quarter of the debtor's "nonpriority unsecured claims" or $8,175, whichever is greater, or (2) $13,650.[59] A debtor may reduce their monthly income by "monthly expense amounts specified under the National Standards and Local Standards" and the debtor's "Other Necessary Expenses issued by the [IRS]."[60] Debtors may also reduce reasonably necessary monthly expenses for the care and support of chronically ill, disabled, or elderly household members,[61] actual chapter 13 plan administrative expenses,[62] and public or private school expenses for each dependent child.[63]

The amended language of Section 707(b)(3)'s totality of the circumstances test reflects Congress's goal of curbing abuse in chapter 7. The pre-BAPCPA language requiring the demonstration of substantial abuse was lowered to a mere showing of abuse.[64] The provision establishing a "presumption in favor of

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56 Between September of 2019 and September of 2020, there were 396,424 nonbusiness chapter 7 filings and 193,095 nonbusiness chapter 13 filings. U.S. CTS., *Table F-2: U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2020*, 1, 1 (2020) (available at https://www.uscourts.gov/sites/default/files/bf_f2_0930.2020.pdf).

57 *In re* Glenn, 345 B.R. 831, 835 (Bankr. N.D. Ohio 2006).

58 11 U.S.C. § 707(b)(1) (2018). The Bankruptcy Code defines "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose." *Id.* § 101(8).

59 *Id.* § 707(b)(2)(A)(i).

60 *Id.* § 707(b)(2)(A)(ii)(I). These monthly expenses include "reasonably necessary health insurance, disability insurance, and health savings account expenses." *Id.*

61 *Id.* § 707(b)(2)(A)(ii)(II).

62 *Id.* § 707(b)(2)(A)(ii)(III).

63 *Id.* § 707(b)(2)(A)(ii)(IV).

64 *See* H.R. REP. NO. 109-31(I), at 12 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 98; *see also In re* Mestemaker, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007).

granting the relief requested by the debtor," under Section 707(b) was also removed.[65]

While Congress primarily intended for the means test to deter chapter 7 abuse by individual debtors capable of repayment, its determinations are also relevant in the chapter 13 context.[66] The means test calculates the amount of disposable income for above-median income debtors.[67] A debtor is subject to the means test if their current monthly income exceeds the median family income in the debtor's state of residence.[68] The method of calculating disposable income in Section 1325(b)(2) remains unchanged for below-median debtors.[69]

C. The "Hanging Paragraph" of § 541(b)(7) Applied to § 1325(b)(2)

Under Section 541(a)(1), "property of the bankruptcy estate consists of all legal and equitable interests of the debtor in property as of the commencement of the case, subject to certain exceptions, namely those found in subsection[s] (b) and (c)(2)."[70] Section 541(b)(7) provides:

> (b) Property of the estate does not include—
>
> . . . .
>
> (7) any amount—
> (A) withheld by an employer from the wages of employees for payment as contributions—
> (i) to—
> (I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;
> (II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

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65 11 U.S.C. § 707(b) (2004). Before BAPCPA's 2005 enactment, Section 707(b) stated that "the court . . . may dismiss a case filed by an individual debtor under [chapter 7] . . . if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor." *Id*. However, Section 707(b)(1) now provides that "the court . . . may dismiss a case filed by an individual debtor under this chapter . . . if it finds that the granting of relief would be an abuse of the provisions of this chapter." *Id.* § 707(b)(1) (2018).

66 *See* 151 CONG. REC. S3036–37 (daily ed. Mar. 1, 2005) (statement of Sen. Chuck Grassley).

67 *See* 11 U.S.C. § 1325(b)(3) (2018).

68 *See Id.*; 9 AM. JUR. 2D *Bankruptcy* § 3075 (2021).

69 *See* 11 U.S.C. § 1325(b)(2)–(3) (2018); *see also* Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 237 (2005).

70 Seafort v. Burden (*In re* Seafort), 669 F.3d 662, 667 (6th Cir. 2012); *see* 11 U.S.C. § 541(a)(1) (2018).

> (III) a tax deferred annuity under section 403(b) of the Internal Revenue Code of 1986;
>
> *except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2).*[71]

The interpretation of the emphasized portion, known as the "hanging paragraph,"[72] has been the source of "considerable disagreement among courts and litigants nationwide."[73] Recently the Sixth Circuit noted that "BAPCPA's insertion of the hanging paragraph into Section 541(b)(7) has taken us from an 'overwhelming consensus' among bankruptcy courts, to four competing views of whether voluntary retirement contributions constitute disposable income in a [c]hapter 13 bankruptcy."[74]

D. 401(k) Employer Contribution Plans

Many American workers use a 401(k), one of the most commonly used methods of saving, in planning for their retirement.[75] Vanguard defines a 401(k) plan as a "defined contribution plan that allows employees to contribute pre-tax dollars through salary deferral."[76] In a 401(k) plan, the contribution is taken out of the paycheck before being taxed, which allows the participant to reduce their taxable income.[77] The 401(k) savings are taxed when they are removed from the account, usually at retirement when the participant is likely in a lower-tax bracket.[78]

Most 401(k) plan participants are given the option to invest their contributions into "a variety of investment options—including stocks, bonds,

[71] *Id.* § 541(b)(7)(A)(i) (emphasis added).

[72] *Seafort*, 669 F.3d at 672–73.

[73] Davis v. Helbling (*In re* Davis), 960 F.3d 346, 351 (6th Cir. 2020).

[74] *Id*. at 351–53 (citation omitted).

[75] Christine Benz, *100 Must-Know Statistics About 401(k) Plans*, MORNINGSTAR (Sept. 4, 2020), https://www.morningstar.com/articles/1000743/100-must-know-statistics-about-401k-plans. Congress added Section 401(k) to the Internal Revenue Code through its enactment of the Revenue Act of 1978. Colleen E. Medill, *Stock Market Volatility and 401(k) Plans*, 34 U. MICH. J.L. REFORM 469, 475 n.22 (2001).

[76] *401(k) Plan,* VANGUARD: GLOSSARY FIN. TERMS, https://retirementplans.vanguard.com/VGApp/pe/Glossary?Term=Glossary401plan (last visited Oct. 26, 2020).

[77] *Before-Tax Contributions,* VANGUARD: GLOSSARY FIN. TERMS, https://retirementplans.vanguard.com/VGApp/pe/Glossary?Term=beforetaxcontributions (last visited Oct. 26, 2020).

[78] A participant may withdraw money before retirement, but the distribution is usually subject to an early-withdrawal penalty. *See Withdrawal,* VANGUARD: GLOSSARY FIN. TERMS, https://retirementplans.vanguard.com/VGApp/pe/Glossary?Term=withdrawal (last visited Oct. 26, 2020).

short-term reserves, mutual funds, and company stock."[79] Often, an employer will match a percentage of an employee's contribution up to a set amount.[80]

E. The IRS Standards

Some sections of the Bankruptcy Code reference the standards promulgated by the Internal Revenue Service.[81] The means test provides several different types of expenses that a debtor may use to offset, and effectively reduce, their monthly income.[82] Additionally, the means test also states that the debtor's monthly expenses are the "amounts specified under the National Standards and Local Standards, and . . . *Other Necessary Expenses* issued by the [IRS] for the area in which the debtor resides."[83] The categories specified in the IRS National Standards are Food, Clothing and Other Items ("FCOI") and Out of Pocket Health Care Expenses.[84]

The FCOI category accounts for allowable "reasonable amounts" for the following types of expenses: apparel and services, food, housekeeping supplies, personal care products and services, and miscellaneous expenses.[85] The only other relevant expense within the FCOI category is the "miscellaneous" expense, which the IRS defines as "a percentage of the other categories . . . based on Bureau of Labor Statistics (BLS) data."[86] The Local Standards provided by the IRS also fail to address post-petition 401(k) contributions.[87]

The Other Necessary Expenses category of the IRS Standards states that, "[o]ther expenses may be necessary or conditional. Other necessary expenses meet the necessary expense test and normally are allowed. The amount allowed must be reasonable considering the taxpayer's individual facts and

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[79] *Supra* note 76. As of 2017, the average number of investment choices for a 401(k) plan is twenty-eight. Benz, *supra* note 75.

[80] As of 2017: (1) fifty-eight percent of 401(k) plans with less than $1 million in assets offered matching employer contributions; (2) seventy-eight percent of 401(k) plans with less than $10 million in assets offered matching employer contributions; (3) and ninety-eight percent of 401(k) plans with more than $100 million in assets offered matching employer contributions. Benz, *supra* note 75.

[81] *See* 11 U.S.C. § 707(b)(2)(A)(ii) (2018).

[82] *Id*.

[83] *Id*. (emphasis added).

[84] The "Out of Pocket Health Care Expenses" category does not address the issue of post-petition 401(k) contributions. IRM §§ 5.15.1.9(1), (5) (Aug. 29, 2018). However, this category does explicitly include: (1) prescription drugs; (2) medical supplies, and (3) medical services. IRM § 5.15.1.9(5)(a)–(c) (Aug. 29, 2018).

[85] *Id.* § 5.15.1.9(1)(a)–(e) (Aug. 29, 2018).

[86] *Id.* § 5.15.1.9(1)(e) (Aug. 29, 2018).

[87] The Local Standards only include "Housing and Utilities" and "Transportation." *Id.* § 5.15.1.10 (July 24, 2019).

circumstances."[88] To pass the necessary expense test, an expense must "provide for a taxpayer's and his or her family's health and welfare and/or production of income."[89] The only relevant example provided under the Other Necessary Expenses category is "Involuntary Deductions," which may qualify as a necessary expense if the deductions are "a requirement of the job[,] e.g., union dues, uniforms, work shoes."[90]

All individual debtors pursuing chapter 7 relief must file a statement of current monthly income on Official Bankruptcy Form 122A-1 (the "Monthly Income Form").[91] The debtor must prepare the chapter 7 means test calculation on Official Form 122A-2 (the "Means Test Form")[92] if the Monthly Income Form indicates that the debtor earns an above-median income. [93] The first part of the Means Test Form computes the debtor's adjusted income,[94] while the second part calculates the debtor's possible deductions.[95]

Part two of the Means Test Form specifically instructs filers that "[t]he [IRS] issues National and Local Standards for certain expense amounts."[96] Line 17 of part two provides: "Involuntary deductions: The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs. *Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings*."[97] Similarly, Official Form 122C-2 (the "Disposable Income Form") instructs chapter 13 debtors to "not include amounts that are not required by your job, such as voluntary 401(k)

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88 *Id.* § 5.15.1.11(1) (Aug. 29, 2018).

89 *Id.* § 5.15.1.8(1) (July 24, 2019).

90 *Id.* § 5.15.1.11(3) (Aug. 29, 2018); *see In re* Lenton, 358 B.R. 651, 657 (Bankr. E.D. Pa. 2006) (finding a presumption of abuse where the debtor unsuccessfully argued that he could deduct 401(k) loan repayments from his disposable income because they were a requirement of his job under the Other Expenses Category in the Internal Revenue Manual).

91 Federal Rule of Bankruptcy Procedure 1007(b)(4) requires the filing of "a statement of current monthly income prepared as prescribed by the appropriate Official Form." FED. R. BANKR. P. 1007(b)(4).

92 U.S. CTS., *Official Form 122A-2: Chapter 7 Means Test Calculations* (2019) (available at https://www.uscourts.gov/sites/default/files/form_b_122a-2.pdf).

93 *See* FED. R. BANKR. P. 1007(b)(4) (stating "if the current monthly income exceeds the median family income for the applicable state and household size, [an individual debtor in a chapter 7 case shall file] the information, including calculations, required by § 707(b), prepared as prescribed by the appropriate Official Form").

94 U.S. CTS., *supra* note 92 at 1.

95 *Id.* at 2–8.

96 *Id*. at 2.

97 *Id*. at 5 (emphasis added).

contributions or payroll savings" as involuntary deductions from the Other Necessary Expenses IRS category.[98]

II. Judicial Interpretation and the Evolving Classification of Voluntary Post-Petition 401(k) Contributions in Chapter 13 Cases

Since the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, courts determined what expenses are reasonably necessary for the maintenance or support of a debtor on a case-by-case basis.[99] Following BAPCPA, bankruptcy courts have employed various tools of statutory interpretation to determine whether post-petition 401(k) contributions constitute disposable income in a chapter 13 plan; while most courts hold that all post-petition 401(k) contributions are excluded from disposable income available to creditors, some courts still disagree on the extent that post-petition 401(k) contributions are reasonably necessary in the context of Section 541(b)(7).[100]

Part II.A examines the pre-BAPCPA majority view that post-filing 401(k) contributions do not receive protection from creditors. Part II.B examines the three distinct approaches in interpreting Section 541(b)(7) that courts developed after the enactment of BAPCPA. Specifically, Part II.B analyzes the tools of statutory interpretation and policy rationales used by different jurisdictions to determine if post-petition 401(k) contributions can be shielded from creditors.

A. Patterson*,* Hebbring*, and Other Pre-BAPCPA Decisions*

The Supreme Court addressed the treatment of pre-petition 401(k) savings in relation to the bankruptcy estate before BAPCPA. In *Patterson v. Shumate*, the Supreme Court held that the Bankruptcy Code excluded a debtor's pre-petition 401(k) savings from property of the estate in chapter 13 cases.[101] While the Supreme Court did not address the treatment of post-petition 401(k), there was a consensus among the federal courts as to the treatment of such contributions: voluntary post-petition 401(k) contributions were not reasonably necessary for the maintenance or support of a debtor, and therefore constituted

[98] U.S. CTS., *Official Form 122C-2: Ch. 13 Calculation of Your Disposable Income,* 1, 4 (2019) (available at https://www.uscourts.gov/sites/default/files/form_b_122c-2.pdf). All individual debtors seeking chapter 13 relief must file a calculation of disposable income on Official Form 122C-2. FED. R. BANKR. P. 1007(b)(6).

[99] *See e.g.*, N.Y.C. Emps.' Ret. Sys. v. Sapir (*In re* Taylor), 243 F.3d 124, 126 (2d Cir. 2001); *In re* Guild, 269 B.R. 470, 473–74 (Bankr. D. Mass. 2001); *In re* King, 308 B.R. 522, 530–31 (Bankr. D. Kan. 2004).

[100] *Compare* Baxter v. Johnson (*In re* Johnson), 346 B.R. 256 (Bankr. S.D. Ga. 2006), *with In re* Prigge, 441 B.R. 667, 679 (Bankr. D. Mont. 2010), *and* Seafort v. Burden (*In re* Seafort), 669 F.3d 662, 663 (6th Cir. 2012).

[101] Patterson v. Shumate, 504 U.S. 753, 760–64 (1992).

disposable income.[102] Some courts declined to follow this majority view, and instead adopted a case-by-case approach for determining the treatment of post-petition 401(k) contributions.[103] This section examines the Supreme Court's decision addressing pre-petition 401(k) savings, along with the Second and Fourth Circuit's decisions addressing post-petition 401(k) contributions.

1. Patterson *and Pre-Petition 401(k) Contributions*

In *Patterson v. Shumate*, the Supreme Court considered "whether an antialienation provision contained in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under 'applicable nonbankruptcy law.'"[104] In 1982, the Coleman Furniture Corporation filed for chapter 11 bankruptcy after suffering financial difficulties.[105] Two years later, Joseph B. Shumate, Jr., the President and Chairman of the Board of Directors of the Coleman Furniture Corporation, also filed for relief.[106] Coleman Furniture Corporation's and Shumate's cases were both converted to chapter 7.[107] At the time of filing, around 400 employees, including Shumate, participated in the Coleman Furniture Corporation Pension Plan, which "satisfied all applicable requirements of the Employee Retirement Income Security Act of 1974."[108] The pension plan provided an antialienation provision "required for qualification under Section 206(d)(1) of ERISA."[109] The trustee for the corporation's bankruptcy filing "terminated and liquidated the [p]lan, providing full distributions to all participants except Shumate."[110] In this case, the district court faced the issue of whether to exclude Shumate's pension plan from his

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102 *See In re* Johnson, 241 B.R. 394, 399 (Bankr. E.D. Tex. 1999); *In re* Austin, 299 B.R. 482, 486–87 (Bankr. E.D. Tenn. 2003); *In re* Keating, 298 B.R. 104, 110 (Bankr. E.D. Mich. 2003); *In re* Regan, 269 B.R. 693, 697 (Bankr. W.D. Mo. 2001); *In re* Merrill, 255 B.R. 320, 323–24 (Bankr. D. Or. 2000); *In re* Cox, 249 B.R. 29, 32 (Bankr. N.D. Fla. 2000); *In re* Cohen, 246 B.R. 658, 666–67 (Bankr. D. Colo. 2000); *In re* Hansen, 244 B.R. 799, 802 (Bankr. N.D. Ill. 2000).

103 *See* Hebbring v. U.S. Tr., 463 F.3d 902, 906–07 (9th Cir. 2006); N.Y.C. Emps.' Ret. Sys. v. Sapir (*In re* Taylor), 243 F.3d 124, 129–30 (2d Cir. 2001); *see also In re* Guild, 269 B.R. 470, 473–74 (Bankr. D. Mass. 2001); *In re* King, 308 B.R. 522, 530–31 (Bankr. D. Kan. 2004).

104 Patterson v. Shumate, 504 U.S. 753, 755 (1992).

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* ("Each plan shall provide that benefits provide that benefits provided under the plan may not be assigned or alienated.") (citing 29 U.S.C. § 1056(d)(1)).

110 *Id.*

bankruptcy estate or, as a secondary option, exempt the plan under the Bankruptcy Code's exemption section.[111]

The district court held that the Bankruptcy Code's "reference to nonbankruptcy law embraced only state law, not federal law such as ERISA" and, therefore, "Shumate's interest in the [pension plan] did not qualify for protection."[112] The case was reversed on appeal.[113] The Fourth Circuit held that "Shumate's interest in the pension plan should be excluded from the bankruptcy estate under [Section] 541(c)(2)" because of the plan's anti-alienation provision required by ERISA.[114] The court declined to address whether Shumate's interest qualified for exemption under the Bankruptcy Code's exemptions section because "where trusts contain enforceable restrictions on transfer of a beneficial interest, those restrictions must be recognized in bankruptcy . . . to exclude the interest from the debtor's estate."[115]

The Supreme Court granted *certiorari* and held that "a debtor may exclude interest in an ERISA-qualified pension plan from the bankruptcy estate."[116] The Court found the Fourth Circuit's reliance on the plain meaning of the Bankruptcy Code persuasive and agreed that "[n]othing in [Section] 541 suggests that the phrase 'applicable nonbankruptcy law' refers . . . exclusively to state law."[117] The Court also emphasized that "[r]eading the term 'applicable nonbankruptcy law' in [Section] 541(c)(2) to include federal as well as state law comports with other references in the Bankruptcy Code to sources of law."[118] Specifically, the Court found that other provisions of the Bankruptcy Code were indicative of Congress's cognizant ability to "restrict the scope of applicable law to 'state law.'"[119] Accordingly, the Court concluded that "Congress' decision to use the

111 Shumate argued that his pension plan was "exempt under Federal law" from the bankruptcy estate under Section 522(b)(2)(A) because ERISA and the IRC required that his pension plan contain an anti-assignment clause. Section 522(b)(2)(A), in relevant part, provides that "an individual debtor may exempt from property of the estate . . . [a]ny property that is exempt under Federal law." Creasy v. Coleman Furniture Corp. 83 B.R. 404, 405 (Bankr. W.D. Va. 1988) (citing 11 U.S.C. § 522(b)(2)(A)).

112 *Patterson*, 504 U.S. at 756 (1992) (internal marks omitted); 11 U.S.C. § 541(c)(2) (2018).

113 Shumate v. Patterson, 943 F.2d 362, 362 (4th Cir. 1991), *cert. granted sub nom.*, Patterson v. Shumate, 112 S. Ct. 932, *aff'd*, 112 S. Ct. 2242 (1992).

114 *Id*. at 365.

115 *Id*.; *see* 11 U.S.C. §§ 522, 541 (2018).

116 *Patterson*, 504 U.S. at 755. "The antialienation provision required for ERISA qualification and contained in the Plan at issue in this case thus constitutes an enforceable transfer restriction for purposes of § 541(c)(2)'s exclusion of property from the bankruptcy estate." *Id*. at 760.

117 *Id*. at 758.

118 *Id*.

119 *Patterson*, 504 U.S. at 758; *see* 11 U.S.C. § 109(c)(2) (2018) (providing that an entity may be a debtor under chapter 9 if authorized "by State law"); *id.* § 622(b)(2) (2018) (election of exemptions controlled by "the

broader phrase 'applicable nonbankruptcy law' in Section 541(c)(2) strongly suggests that it did not intend to restrict the provision" to only state law.[120]

2. *The Second Circuit Case-By-Case Test*

In *New York City Employees' Retirement System v. Sapir (In re Taylor)*, an appeal for the treatment of a debtor's employer-mandated pension contributions under Section 1325(b) was at issue before the Second Circuit.[121] Taylor—a city employee—filed for chapter 13 relief in 1998.[122] Her employment required that she automatically contribute to a multi-employer benefit plan from her salary.[123] The bankruptcy court held that "pension withholdings from a [c]hapter 13 debtor's salary are disposable income and thus must be included in the Plan to pay outstanding debts and obtain discharge" based on prior precedent.[124] The district court affirmed the bankruptcy court's decision because the required payroll deductions "may not be allowed to interfere with the creditors' entitlement to receive all of the debtor's disposable income under Section 1325(b)(1)(B)."[125]

The Second Circuit declined to adopt a strict rule, and instead outlined a series of factors to consult when confronted with the issue of whether employee pension contributions constitute disposable income.[126] The factors include:

State law that is applicable to the debtor"); *id.* § 523(a)(15) (2018) (a debt for alimony, maintenance, or support determined "in accordance with State or territorial law" is not dischargeable); *id.* § 903(1) (2018) ("a State law prescribing a method of composition of indebtedness" of municipalities is not binding on nonconsenting creditors); *see also id.* §§ 362(b)(12),1145(a) (2018).

120 *Patterson*, 504 U.S. at 758.

121 N.Y.C. Emps.' Ret. Sys. v. Sapir (*In re* Taylor), 243 F.3d 124, 126 (2d Cir. 2001).

122 *Id.*

123 *Id.* at 126–27.

> Pursuant to the Trustee's objection to the [p]lan, [d]ebtor filed a motion in bankruptcy court requesting an order that [her employers] "cease payroll deduction for pension contribution for the duration of the [bankruptcy] plan." [debtor's employers] objected to [d]ebtor's motion on the ground that pension contributions are mandated by state statutes that require that certain public employees participate as members of [the employer] and that members contribute to the fund. Because membership and contributions are mandated by state statute, [debtor's employer] argued that the pension contributions are a reasonably necessary expense and, therefore, cannot be included as disposable income in the [p]lan.

Id. at 126–27 (fourth alteration in original).

124 *Id.* at 127.

125 *Id.* at 126–27 (internal marks and citation omitted).

126 *Id.* at 129–30. The court analyzed two cases with similar facts to the case at issue that reached opposite conclusions. In *In re Nation*, the bankruptcy court held that "pension contributions, though required by state statute, are not truly mandatory and, therefore, must count as disposable income." *Id.* at 128 (citing *In re* Nation,

> (1) the age of the debtor and the amount of time until expected retirement; (2) the amount of the monthly contributions and the total amount of pension contributions debtor will have to buy back if the payments are discontinued; (3) the likelihood that buy-back payments will jeopardize the debtor's fresh start; (4) the number and nature of the debtor's dependents [sic]; (5) evidence that the debtor will suffer adverse employment conditions if the contributions are ceased; (6) the debtor's yearly income; (7) the debtor's overall budget; (8) who moved for an order to discontinue payments; and (9) any other constraints on the debtor that make it likely that the pension contributions are reasonably necessary expenses for that debtor.[127]

Before BAPCPA, many bankruptcy courts agreed with the reasoning set forth by the court in *In re Taylor*.[128] For example, in *In re Guild*, the court concluded that "the facts surrounding each individual case must be analyzed in order to make a fair determination as to whether the money being utilized for loan repayment is reasonably necessary for the maintenance and support of a debtor."[129] The court acknowledged that "debtors cannot live by bread alone,"[130] and that interpreting reasonably necessary requires finding "a balance between debtors being required to adopt a totally spartan existence and allowing them to 'continue an extravagant lifestyle at the expense of creditors.'"[131]

236 B.R. 150, 154 (Bankr. S.D.N.Y. 1999)). Basing their decision on the doctrine of preemption, the court reasoned "that the mandatory state law conflicts with the Bankruptcy Code and, therefore, the Code preempts the state law." *Id*. ("National policy codified in a statute of Congress such as the Bankruptcy Code must be given primacy over local enactments and private contracts.") (citing *Nation*, 236 B.R. at 154). However, in *In re Davis*, the court "reject[ed] *Nation*'s use of the doctrine of preemption . . . [and] noted that it had no reason to apply the doctrine because the state statute, read with the above definition of reasonably necessary, did not actually conflict with the Code." *Id*. at 129 (Finding "no evidence of congressional intent to preempt" and concluding that that "because the debtor's job was obviously reasonably necessary to his maintenance and support, the deductions were therefore reasonably necessary and could not be included as disposable income.") (citing *In re* Davis, 241 B.R. 704, 708–09 (Bankr. D. Mont. 1999) (1999)).

127 *Id*. at 129–30.

128 *See, e.g.*, *In re* Guild, 269 B.R. 470, 474 (Bankr. D. Mass. 2001); *In re* King, 308 B.R. 522, 530–31 (Bankr. D. Kan. 2004).

129 *In re* Guild, 269 B.R. at 474 (internal marks omitted). "There is an inherent unfairness in adopting a per se rule that says retirement loan repayments are never reasonably necessary for the maintenance and support of a debtor and thus should always be considered disposable income." *Id*.

130 *Id*. at 472.

131 *Id*. (internal marks and citation omitted). "Therefore, a court must factor into its analysis essential expenditures, 'such as reasonable amounts budgeted for food, clothing and shelter' as well as 'discretionary spending for items such as recreation, clubs, entertainment, newspapers, charitable contributions and other expenses.'" *Id*. (quoting *In re* Beckel, 268 B.R. 179, 183 (Bankr. N.D. Iowa 2001).

3. *The* Hebbring *Test*

In *Hebbring v. U.S. Trustee*, the Ninth Circuit adopted a "case-by-case approach, under which contributions to a retirement plan may be found reasonably necessary depending on the debtor's circumstances."[132] Declining to define "reasonably necessary," the court reasoned that "the Code suggests courts should examine each debtor's specific circumstances to determine whether a claimed expense is reasonably necessary for that debtor's maintenance or support."[133] According to the court, a case-by-case approach "better comports with Congress's intent, as expressed in the language, purpose, and structure of the Bankruptcy Code."[134]

The *Hebbring* test suggests that courts apply the *In re Taylor*[135] factors originally used for employee pension plans, to determine whether post-petition retirement contributions are a reasonably necessary expense.[136] If a debtor's proposed retirement savings "appear reasonably necessary for the maintenance or support of the debtor or the debtor's dependents," then a court must approve the debtor's proposed plan.[137] Also, the *Hebbring* court highlighted the idea that: "[t]he case-by-case approach . . . should be no more difficult to apply to retirement contributions than to other forward-looking expenses that bankruptcy courts must evaluate for reasonableness."[138] To illustrate this concept, the court compared the reasonableness of post-petition contributions by an older debtor nearing retirement, with the unreasonableness of post-petition contributions by a married couple in their early thirties.[139]

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[132] Hebbring v. U.S. Tr., 463 F.3d 902, 906 (9th Cir. 2006).

[133] *Id*.

[134] *Id*.

[135] N.Y.C. Emps.' Ret. Sys. v. Sapir (*In re* Taylor), 243 F.3d 124, 129-30 (2d Cir. 2001).

[136] *Hebbring*, 463 F.3d at 907 (citing *N.Y.C. Emps.' Ret. Sys.*, 243 F.3d at 129–30).

[137] *Id*. (citing 11 U.S.C. § 1325(b)(2)).

[138] *Id*. at 908. The court listed "life insurance premiums, private school tuition for debtors' children, [and] home maintenance costs" as examples of other forward-looking expenses that arise in bankruptcy courts. *Id*. (internal citation omitted).

[139] *See id*. The court compared *In re Osborne*, where "401(k) contributions of less than 2% of debtors' $71,280 annual gross income were not a reasonably necessary expense for a married couple in their early thirties" with *In re Mills*, where the "401(k) contributions of 10% of debtor's $36,228 annual gross income were a reasonably necessary expense for a fifty-six-year-old debtor with total retirement savings of $9,000." *Id*. (*comparing In re* Osborne, No. 02-24999-HRT, 2003 Bankr. LEXIS 326 (Bankr. D. Colo. Apr. 8, 2003), *with In re* Mills, 246 B.R. 395, 399, 402 (Bankr. S.D. Cal. 2000).

B. Johnson*,* Prigge*, and* Seafort*: Post-BAPCPA Decisions*

An important change made by BAPCPA was Congress's protection of pre-petition 401(k) savings through the addition of Section 541(b)(7)(A). However, Congress's further addition of the hanging paragraph to Section 541(b)(7) ultimately complicated the how courts evaluate post-petition 401(k) contributions. Courts remain uncertain as to whether these contributions constitute disposable income. This section examines the three major post-BAPCPA decisions to date: (1) *In re Johnson*; (2) *In re Prigge*; and (3) *In re Seafort*.

1. Johnson *Approach*

One year after Congress signed BAPCPA into law, the United States Bankruptcy Court for the Southern District of Georgia addressed whether post-petition 401(k) contributions were disposable income under Section 541(b)(7) in *Baxter v. Johnson*.[140] The Johnsons filed for chapter 13 relief because their combined income of $56,221 exceeded the applicable median income of $51,545.[141] Their repayment plan proposed a monthly payment of $303 to creditors over a five-year commitment period.[142] The trustee objected to the proposed plan on the grounds that "the [d]ebtors' actual incomes and actual expenses . . . indicate that they are able to pay more to their unsecured creditors,"[143] while the debtors contended that Section 1325(b) "conclusively determines the amount of disposable income available for creditors."[144]

The bankruptcy court held that the Johnsons' voluntary contributions to their 401(k) plans and their 401(k) loan repayments did not qualify as disposable income.[145] For 401(k) loan repayments, Section 1322(f) provides "a plan may not materially alter the terms of a loan described in section 362(b)(19) [i.e., a loan from a qualifying employee benefit plans or retirement savings accounts], and any amounts required to repay such loan shall not constitute 'disposable income' under section 1325."[146] The bankruptcy court reasoned that Section 541(b)(7) "plainly state[s] that these contributions 'shall not constitute disposable income'" under Section 1325(b)(2), subject only to the good faith

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140 Baxter v. Johnson (*In re* Johnson), 346 B.R. 256 (Bankr. S.D. Ga. 2006).

141 *Id*. at 259.

142 *Id*. at 260.

143 *Id*. at 261. The debtors proposed to repay a total of $18,180 while contributing $1,128.72 per month to their 401(k) retirements account ($67,723.20 in total over the same five-year plan period). *Id*. at 263.

144 *Id*. at 261.

145 *Id*. at 263.

146 *Id*. (quoting 11 U.S.C. § 1322(f)) (alteration in original).

requirement imposed by the Bankruptcy Code.[147] Despite turning to the IRS Standards to address the trustee's other objections, the bankruptcy court ended its post-petition 401(k) contribution and loan repayment inquiry after exclusively using the plain meaning of the text.[148]

Section 1325(a)(3) requires that "the plan has been proposed in *good faith* and not by any means forbidden by law" for court confirmation.[149] The bankruptcy court found that BAPCPA's amendments to Section 1325(b) "alter the good faith inquiry under § 1325(a)(3)" by "narrow[ing] the scope of judicial discretion."[150] After discussing several types of income that "[d]ebtors [were] not required to contribute . . . to their [c]hapter 13 plans," the bankruptcy court declined to incorporate those types of income under its Section 1325(a)(3) good faith analysis.[151] The bankruptcy court found that the Johnsons' post-petition 401(k) loan repayments and voluntary contributions were in good faith and noted that "[s]o long as a debtor's contributions [were] within the limits legally permitted by the [employee benefit plan], 'any amount' of this contribution [was] exempted from disposable income."[152] The court concluded that "Congress has placed retirement contributions outside the purview of a chapter 13 plan."[153]

Using the court's analytical framework in *Johnson*, some courts reason that Section 541(b)(7) provides that retirement plan contributions do not constitute disposable income for the purposes of Section 1325(b)(2).[154] *In re Devilliers*, the bankruptcy court found nothing in the Bankruptcy Code requiring that retirement account contributions be "reasonable and necessary," and reasoned

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147 Baxter v. Johnson (*In re* Johnson), 346 B.R. 256, 263 (Bankr. S.D. Ga. 2006); 11 U.S.C. § 1325(a)(3) (2018).

148 Johnson, 346 B.R. at 263–68.

149 11 U.S.C. § 1325(a)(3) (emphasis added). "Although the Code does not explicitly define the term 'good faith,' the inquiry into good faith is 'broadly speaking . . . whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [chapter 13] in the [proposed plan].'" *Johnson*, 346 B.R. at 261 (quoting Kitchens v. Ga. R.R. Bank & Tr. Co. (*In re* Kitchens), 702 F.2d 885, 888 (11th Cir. 1983) (citation omitted)).

150 Johnson, 346 B.R. at 262. The court found that "BAPCPA recasts the totality-of-the-circumstances test set forth in *Kitchens*" that the Eleventh Circuit provided to determine the good faith of a chapter 13 debtor. *Id.* (citing *Kitchens*, 702 F.2d at 888–89).

151 *Id.* at 263.

152 *Id.*

153 *Id.*

154 *In re* Devilliers, 358 B.R. 849, 864–65 (Bankr. E.D. La. 2007) ("As excluded income, the contributions are not a deduction because they were never included in the first instance."); *see In re* Shelton, 370 B.R. 861, 864 (Bankr. N.D. Ga. 2007) (adopting the reasoning in *Devilliers*); *In re* Leahy, 370 B.R. 620, 625 (Bankr. D. Vt. 2007) (same).

that the absence of such language in Section 541(b)(7) was significant.[155] *In re Egan*, the court reached the same conclusion, explaining that the "language [of Section 1306(a)(1)] makes clear that property of the type specified by [Section] 541 that is acquired post-petition by a chapter 13 debtor, and not just post-petition income, becomes part of that debtor's chapter 13 estate."[156]

2. Prigge *Approach*

Four years after *Johnson*, the United States Bankruptcy Court for the District of Montana considered whether post-petition retirement account contributions were a necessary expense under Section 541(b)(7).[157] Prigge filed for chapter 13 relief because his $89,739.96 income exceeded the applicable median income for the state of Montana and made him ineligible for chapter 7 relief.[158] His original plan proposed a monthly payment of $100 over the course of the five-year commitment period, and "the liquidation analysis stated $0.00 would be distributed to unsecured claims."[159] The trustee objected to the proposed plan on the grounds that "the plan was not filed in good faith" under [Section]1325(a)(3) and "that the Debtor failed to satisfy the disposable income test of [Section] 1325(b)."[160]

Using the tools of statutory interpretation,[161] the bankruptcy court noted that, in drafting Section 1322(f), Congress specifically excluded amounts required to repay loans taken out of retirement plans from disposable income, but ultimately failed to draft any provision to specifically exclude voluntary 401(k) plan

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155 Devilliers, 358 B.R. at 864–65.

> [U]nlike the provisions of § 707(b)(2) and § 1325(b)(2) or (3), § 541(b)(7) does not modify excluded contributions based on reasonableness or necessity. Throughout the other applicable sections of the Code, every deduction offered is modified by a requirement that the expense be "necessary and reasonable." Yet, § 541(b)(7) omits any reference to this important limitation on the exclusion.

Id.

156 *In re* Egan, 458 B.R. 836, 846 (Bankr. E.D. Pa. 2011) (citing *In re* Willett, 544 F.3d 787, 791 (7th Cir. 2008)). "Section 1306(a)(1) incorporates into a chapter 13 estate 'all property of the kind specified in [§ 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted.'" *Id*. (quoting 11 U.S.C. §1306(a)(1)).

157 *In re* Prigge, 441 B.R. 667, 677 n.5 (Bankr. D. Mont. 2010).

158 *Id*. at 669–70.

159 *Id*. at 671.

160 *Id*.

161 *See* Keene Corp. v. United States, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

contributions.[162] The bankruptcy court found that Congress' failure to specifically exclude 401(k) contributions within the Bankruptcy Code was deliberate, and reasoned that "[i]f Congress had intended to exclude voluntary 401(k) contributions from disposable income it could have drafted [Section] 1322(f) to provide for such an exclusion, or provided one elsewhere."[163]

The bankruptcy court relied on *In re Egebjerg*, which declined to include voluntary retirement plan contributions as a necessary expense because "[C]ongress provided, by reference to the IRS guidelines, specific guidance as to what qualifies as a necessary expense."[164] In *In re Egebjerg*, the Ninth Circuit emphasized "that the IRS guidelines themselves provide that contributions to voluntary retirement plans are not a necessary expense."[165] However, the debtor argued that "*Egebjerg* [was] inapplicable because it discusses 401(k) loan repayments in a [c]hapter 7 case, not 401(k) contributions in a [c]hapter 13 case."[166] Nonetheless, the bankruptcy court noted that the debtor's argument "ignore[d] [Section] 1325(b)(3) which specifically requires that amounts reasonably necessary 'shall be determined' under [Section] 707(b)(2)."[167] The bankruptcy court ultimately concluded that the purpose of Section 541(b)(7) was to clarify that pre-petition retirement contributions still in the employer's possession at the time of filing were neither post-petition disposable income, nor property of the estate.[168]

In *In re Prigge*, recent paystubs indicated that the debtor was making monthly contributions of $343.09 to his 401(k) plan before filing for chapter 13.[169] At the time of filing, the debtor's 401(k) balance, from his employer of twenty years, was $4,677.08.[170] Assuming *arguendo* that the debtor was permitted to exclude $1,181.08[171] per month from his disposable income to be repaid to his creditors over the course of five years, he would have prevented a

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162 *In re* Prigge, 441 B.R. 667, 677 (Bankr. D. Mont. 2010); *see* 11 U.S.C. § 1322(f).

163 Prigge, 441 B.R. at 677.

164 *Id*. at 676 (quoting Egebjerg v. Anderson (*In re* Egebjerg), 574 F.3d 1045, 1052 (9th Cir. 2009)).

165 Egebjerg, 574 F.3d at 1052 (internal marks and citation omitted).

166 Prigge, 441 B.R. at 677.

167 *Id*.; 11 U.S.C. §§ 707(b)(2), 1325(b)(3) (2006).

168 *Prigge*, 441 B.R. at 677 n.5 (citing 5 COLLIER ON BANKRUPTCY, ¶ 541.22C[1] (15th ed. rev.) (stating that Section 541(b)(7) "seems intended to protect amounts withheld by employers from employees that are in the employer's hands at the time of filing bankruptcy, prior to remission of the funds to the plan.")).

169 *Id*. at 670–71.

170 *Id*. at 670. Had the debtor's proposed plan of $1,181.08 monthly 401(k) contributions been confirmed, his 401(k) balance would have grown over 1,500% over the five-year commitment period. *Id*. at 677.

171 This figure only accounts for the principal amount and fails to reflect the possibility of investment returns had the debtor decided to invest the money and not leave it in cash. *Id*. at 670–71.

total of $70,864.80 from being distributed to his unsecured creditors.[172] However, the bankruptcy court held that the debtor failed to satisfy the disposable income test and denied confirmation of the plan.[173]

3. Seafort *Approach*

In *In re Seafort*, the Sixth Circuit considered whether the income available to a debtor after their 401(k) loans are fully repaid may be used for voluntary 401(k) contributions and excluded from disposable income under Section 541(b)(7).[174] Before filing for chapter 13 relief in 2008, Seafort was eligible to contribute to her employer's 401(k) retirement plan but declined to do so.[175] Seafort was, however, making $254.71 monthly payments to repay a 401(k) loan.[176] In Seafort's proposed plan, she would pay off the 401(k) loan in full by the nineteenth month, well in advance of the sixty-month commitment period.[177] Once the 401(k) loan was fully repaid, Seafort proposed to voluntarily contribute the $254.71 to her 401(k) for the remaining forty-one months of the plan.[178] The chapter 13 trustee objected to Seafort's plans to contribute additional money to her 401(k), rather than designating those funds as disposable income, because she was "not contributing anything" to her 401(k) at the time of filing for chapter 13 relief.[179]

The Sixth Circuit held that once a debtor's 401(k) loan repayments are fully repaid, the newly available income "is properly committed to the debtor's respective [c]hapter 13 plans for distribution to the unsecured creditors and may not be used to make voluntary retirement contributions."[180] Using statutory interpretation, the Sixth Circuit acknowledged that "Congress's placement of 401(k) loan repayments *within* [c]hapter 13 itself and placement of the exclusion for voluntary retirement contributions elsewhere was deliberate."[181]

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172 The debtor claimed that his employer required a three percent withholding for his 401(k) contributions. Had the debtor correctly filed his plan indicating such, "then that 3% would not be voluntary and prohibited under *Egebjerg*." *Id*. at 677. Accordingly, had the debtor been allowed to contribute the $1,145.64 on top of the mandatory three percent, "[o]ver 60 months that amount would grow to $68,738.40 for distribution to unsecured claims and administrative expenses." *Id*.

173 *Id*. at 679.

174 Seafort v. Burden (*In re* Seafort), 669 F.3d 662, 663 (6th Cir. 2012).

175 *Id*.

176 *Id*. at 664.

177 *Id*.

178 *Id*.

179 *Id*.

180 *Id*. at 674.

181 *Id*. at 672 (6th Cir. 2012); *see* Keene Corp. v. United States, 508 U.S. 200, 208 (1993) ("Where

Accordingly, the court inferred that "Congress did not intend to treat voluntary 401(k) contributions like 401(k) loan repayments, because it did not similarly exclude them from 'disposable income' within [c]hapter 13 itself."[182] However, the court conceded that "§ 541(b)(7) must provide *some* sort of protection for voluntary retirement contributions in chapter 13 cases, because it says that such contributions 'shall not constitute disposable income as defined in section 1325(b)(2).'"[183]

The court then turned to *In re McCullers*, where the Bankruptcy Court for the Northern District of California noted that the "structure suggest[ed] that section 541(b)(7) exclude[d] from property of the estate only property that would otherwise be included in the estate under section 541(a)."[184] The Sixth Circuit agreed with the *McCullers* court and concluded that "the most natural reading of section 541(b)(7) [was] that it exclude[d] from property of the estate only those contributions made before the petition date as indicated by its specifying the contributions excluded from property of the estate and then stating that such amount shall not constitute disposable income."[185] The Sixth Circuit also agreed with the *McCullers* court's conclusion that "the term 'except that' in the hanging paragraph was designed simply to clarify that the voluntary retirement contributions excluded from the property of the estate are not post-petition income to the debtor."[186]

The court also found that the hanging paragraph of Section 541(b)(7)(A) provided an important distinction "between qualified retirement plan contributions in effect as of the commencement of a bankruptcy case and those

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Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

182 Seafort, 669 F.3d at 672. "[A]ny amounts required to repay such loan shall not constitute 'disposable income' under section 1325." *Id.* (citing 11 U.S.C. § 1322(f)).

183 *Id.* (citing 11 U.S.C. § 541(b)(7)).

184 *Id.* (quoting *In re* McCullers, 451 B.R. 498, 503–04 (Bankr. N.D. Cal. 2011)).

185 *Id.* at 673 (internal marks omitted) (quoting *In re* McCullers, 451 B.R. at 503–04).

186 *Id.* (quoting *In re* McCullers, 451 B.R. at 504–05).

> [Section 541(b)(7)] broadly excludes from "property of the estate" funds "withheld by an employer from the wages of employees" as contributions to specified types of employee-benefit plans, deferred compensation plans and tax-deferred annuity plans. It seems intended to protect amounts withheld by employers from employees that are in the employer's hands at the time of filing bankruptcy, prior to remission of the funds to the plan.

In re Prigge, 441 B.R. 667, 677 n.5 (Bankr. D. Mont. 2010) (quoting 5 COLLIER ON BANKRUPTCY, ¶ 541.22C[1] (15th ed. rev.)).

cases where contributions are not in effect as of commencement."[187] The court found the phrase "under this subparagraph" to be particularly significant:

> If all contributions to qualified retirement plans were excluded from disposable income, regardless of whether they were in effect as of the commencement of the bankruptcy case, the phrase "under this subparagraph" would be superfluous, and [Section] 541(b)(7) would simply read "such amount [qualified retirement plan contributions] shall not constitute disposable income as defined in section 1325(b)(2)." As it is written though, Congress intentionally limited the type of contributions to qualified retirement plans that would be excluded from disposable income, namely those "under this subparagraph", [Section] 541(b)(7)(A), which in turn governs only those contributions in effect as of the commencement of a debtor's bankruptcy case, per [Section] 541(a)(1).[188]

According to the court, this explanation "gives effect to every word in the statute"[189] and aligns with the conclusion that "BAPCPA's 'core purpose' is to ensure that debtors devote their full disposable income to repaying creditors and maximizing creditor recoveries."[190]

a. In re Anh-Thu Thi Vu *Approach*

In the case of *In re Anh-Thu Thi Vu*, the Bankruptcy Court for the Western District of Washington adopted a modified version of *Seafort*.[191] Anh-Thu Thi Vu, an above-median debtor, "voluntarily contributed an average of $877 per month to her Thrift Savings Plan" during the six months before filing for chapter 13 relief.[192] Her repayment plan proposed a monthly payment of $80 over the

187 Seafort, 669 F.3d at 673.

188 *Id.* (clarifying Section 541(b)(7)(A) in the context of Sections 541(a)(1) and 1325(b)(2)).

189 *Id.* at 673–74; *see* Penn. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988) (same).

190 Seafort, 669 F.3d at 674 (quoting Baud v. Carroll, 634 F.3d 327, 343, 356 (6th Cir. 2011)). The court also states that "[t]he legislative history supports this reading too." *Id.* (quoting Baud v. Carroll, 634 F.3d 327, 343, 356 (6th Cir. 2011)); *see* H.R. REP. NO. 109-31, pt. 1, at 2–3 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89 ("The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford."); Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 721 (2011) (stating that the Congress's intent in drafting BAPCPA was "to correct perceived abuses of the bankruptcy system" and create the "means test" of Section 707(b) "to help ensure that debtors who can pay creditors do pay them.").

191 *In re* Anh-Thu Thi Vu, 2015 Bankr. LEXIS 1967, at *9–10 (Bankr. W.D. Wash. 2015).

192 *Id.* at *1.

course of the five-year commitment period.[193] The trustee objected to the debtor's deduction of voluntary retirement contributions because "[o]ver the life of the Plan, unsecured creditors will receive a total of $4,619, approximately nine percent of Debtor's $50,343 scheduled unsecured debt, while Debtor will contribute over $50,000 to her [Thrift Savings Plan]."[194] The trustee's objection was based on the Ninth Circuit Bankruptcy Appellate Panel's adoption of the *Prigge* approach.[195] In *In re Parks*, the Ninth Circuit explained that "the most reasonable interpretation of [Section] 541(b)(7)(A) is that it excludes from property of the estate only those [voluntary retirement] contributions made before the petition date."[196]

Looking to its prior decision in *In re Bruce*, which involved a below-median-income debtor, the bankruptcy court noted that its inquiry "went beyond the analysis of *Prigge* and *Parks*."[197] In *In re Bruce*, the court held that "[Section] 541(b)(7)(A)(i)'s hanging paragraph excludes pre-petition voluntary retirement contributions from the calculation of 'current monthly income,' i.e., those contributions made during the six-month [current monthly income] look-back period."[198] The court further explained:

> If those contributions are deducted before determining the debtor's income during that six-month period pre-petition, those contributions are not "disposable income" as that term is defined in [Section] 1325(b)(2), and the monthly average of the contributions during the six-month period pre-petition should not be included in the calculation of [current monthly income] for purposes of calculating disposable income.[199]

The court found that its reasoning in *In re Bruce* also applied to above-median debtors such as Anh-Thu Thi Vu because "calculating current monthly income is the starting point for determining 'disposable income' under [Section] 1325(b)(2), regardless of whether the debtor is above-or below-median-income."[200] Therefore, the court held that "voluntary retirement contributions may be excluded from the calculation of disposable income, to the extent that

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193 After deducting $877 from her disposable income, the debtor was left with $74 in monthly disposable income. *Id*.

194 *Id*. at *1–2.

195 *Id*. at *7 (citing *In re* Parks, 475 B.R. 703, 708 (B.A.P. 9th Cir. 2012); *Parks*, 475 B.R. at 707 ("[W]e find the *Prigge* line of cases persuasive. To avoid repetition, we borrow heavily from these decisions.").

196 Parks, 475 B.R. at 707.

197 Vu, 2015 Bankr. LEXIS 1967, at *8 (citing *In re* Bruce, 484 B.R. 387, 394 (Bankr. W.D. Wash. 2012)).

198 *Id*. (citing Bruce, 484 B.R. at 394).

199 *Id*. (citing Bruce, 484 B.R. at 394).

200 *Id*. at *8.

those contributions were being made pre-petition during the six-month look-back period used to determine" current monthly income.[201]

III. ANALYSIS: SHORTCOMINGS OF THE *JOHNSON* APPROACH

This Comment suggests that the *In re Prigge* and *In re Seafort* opinions—which concluded that voluntary 401(k) contributions should not be excluded from a debtor's disposable income in chapter 13 cases—more effectively comport with the goals of consumer bankruptcy than the *In re Johnson* opinion.[202] Further, the court's interpretation of the hanging paragraph of Section 541(b)(7) in *In re Seafort* provides an especially persuasive analysis of voluntary post-petition 401(k) contributions in bankruptcy in consideration of Congress's intent in enacting BAPCPA.[203] The decisions of the *In re Prigge* and *In re Seafort* courts are also consistent with the language of the IRS Standards, as well as the Supreme Court's pre-BAPCPA ruling in *Patterson v. Shumate*, from which the *In re Johnson* court significantly departed.[204]

First, the exclusion of voluntary post-petition 401(k) contributions from disposable income gives debtors a "head start" instead of merely a "fresh start." Second, the *Johnson* court's interpretation of the "hanging paragraph" of Section 541(b)(7) contradicts other provisions of the Bankruptcy Code. Third, the treatment of voluntary post-petition contributions as "reasonably necessary" for a debtor's maintenance or support conflicts with the IRS Standards referenced by the Bankruptcy Code.

A. *Excluding Voluntary 401(k) Contributions from Disposable Income Gives Debtors a "Head Start" Instead of Merely a "Fresh Start"*

At the signing of the BAPCPA amendments on April 20, 2005, President George W. Bush stated:

> America is a nation of personal responsibility where people are expected to meet their obligations. We're also a nation of fairness and compassion where those who need it most are afforded a fresh start. The act of Congress I sign today will protect those who legitimately

201 *Id*. at *9.

202 *See In re* Prigge, 441 B.R. 667, 677 (Bankr. D. Mont. 2010); Seafort v. Burden (*In re* Seafort), 669 F.3d 662, 674 (6th Cir. 2012).

203 *Seafort*, 669 F.3d at 673.

204 *See id*. at 672 ("observing that the IRS guidelines state that voluntary retirement contributions are not a necessary expense.") (citing *Prigge*, 441 B.R. at 677). *Compare* Patterson v. Shumate, 504 U.S. 753 (1992), *with* Baxter v. Johnson (*In re* Johnson), 346 B.R. 256 (Bankr. S.D. Ga. 2006).

> need help, stop those who try to commit fraud, and bring greater stability and fairness to our financial system. I'm honored to join the members of Congress to sign the Bankruptcy Abuse Prevention and Consumer Protection Act.[205]

His words echo the predominant theory among Congress,[206] courts,[207] and scholars[208]—that consumer bankruptcy provides a fresh start to debtors.[209] This fresh start theory encompasses goals such as preventing debtors from becoming public charges, protecting the interests of creditors, promoting an efficient an uniform bankruptcy system, and safeguarding public and private interests.[210] Maximizing the amount of assets in the bankruptcy estate protects the interests of creditors,[211] while "preserving certain assets necessary to provide a fresh start so that the debtor's future ability to earn and accumulate is not permanently stunted" by bankruptcy safeguards the interests of debtors.[212] These mechanisms in the Bankruptcy Code function to maintain a balance between the rights and interests of debtors and creditors.

Although the balance between debtors and creditors is not entirely equal,[213] a fresh start is distinct from a "head start." A head start equips the debtor with more resources than needed to satisfy the goals of the fresh start, i.e., the survival of the debtor and her dependents.[214] While BAPCPA includes several retirement protections, the "amount a debtor can protect from creditors using retirement

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[205] Presidential Statement on Signing the Bankruptcy Abuse and Consumer Protection Act, 2005, 41 WEEKLY COMP. PRES. DOC. 15 (Apr. 20, 2005).

[206] *See, e.g.*, REP. COMM'N BANKR. L. U.S., H.R. DOC. NO. 93-137, pt. 1, at 79–80 (1973).

[207] *See, e.g.*, Traer v. Clews, 115 U.S. 528, 541 (1885) (holding that "the policy of the Bankruptcy Act [of 1867] was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start"); Wetmore v. Markoe, 196 U.S. 68, 77 (1904) (holding that "[s]ystems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes").

[208] *See, e.g.*, KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 91 (1999) ("Some scholars just reiterate the term *fresh start* in their justification, saying, for example, that debtors should have an 'opportunity to begin anew' or a 'chance to start over.'").

[209] *See* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 68 (2007).

[210] Susan D. Franck, Comment, *Christians v. Crystal Evangelical Free Church: Interpreting RFRA in the Battle Among God, the Government, and the Bankruptcy Code*, 81 MINN. L. REV. 981, 994 (1997).

[211] *Id.* (citing Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 816–17 (1987)).

[212] Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 IND. L.J. 355, 389 (1999) (internal marks omitted).

[213] *See* Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 818 (1987).

[214] Tedra Hobson, *The Bankruptcy Abuse* Creation *Act?: Curing Unintended Consequences of Bankruptcy Reform*, 40 GA. L. REV. 1245, 1271 (2006).

vehicles [is] set by the provisions of the Tax Code that govern them."[215] As a result, there is a possibility that the debtor could obtain a head start in retirement by allocating assets to 401(k) account contributions that are ordinarily available to creditors. Under the *Johnson* majority, the debtor's 401(k) account "would essentially be financed by his creditors"[216] because the assets are excluded from disposable income, and therefore, are off-limits to creditors.

Indeed, allowing chapter 13 debtors to exclude "amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor"[217] aligns with the policy goals of providing a fresh start.[218] If the Bankruptcy Code prohibited excluding portions of monthly income necessary for the maintenance or support, the debtor's ability to earn income needed for the chapter 13 repayment plan would be significantly impaired. Exclusions, therefore, are vital to the debtor's fresh start. However, the need for the debtor to contribute money into a 401(k) account to earn income for chapter 13 plan repayment is less compelling than maintenance or support. Moreover, contributing to a 401(k) is not necessary for anyone's ability, let alone the debtor's, to earn income for support or maintenance, as evidenced by the fact that nearly "a quarter of adults in the U.S. have no retirement savings or pension at all."[219]

B. The Majority's Interpretation of the "Hanging Paragraph" of § 541(b)(7) Contradicts Other Areas Within the Bankruptcy Code

The bankruptcy courts that grant chapter 13 debtors the ability to exclude portions of earned income available to creditors for the purpose of making voluntary 401(k) contributions consistently gloss over other areas within the Bankruptcy Code, specifically Section 1322(f). Given the overwhelming consensus that the Bankruptcy Code is "inelegantly drafted," courts must adopt "an interpretation from competing theories that is not only more consistent with the language of the statute than the competing interpretations, but that is also consistent with the legislative history and the overriding purpose of

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[215] *Id*. at 1271–72 & n.185 (citing ALAN N. RESNICK & HENRY J. SOMMER, THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 WITH ANALYSIS 6 (2005) (explaining all funds in specified tax-exempt accounts are exempted from estate, except some IRAs are capped at $1 million unless judge increases amount in interest of justice)).

[216] *Id*. at 1272.

[217] 11 U.S.C. § 1325(b)(2)(A)(i) (2018).

[218] *See generally In re* Schnabel, 153 B.R. 809, 817 (Bankr. N.D. Ill. 1993) ("Where the Debtor is assured of an income sufficient to meet his basic needs, his fresh start is not imperiled.").

[219] Alicia Adamczyk, *25% of US Adults Have No Retirement Savings*, CNBC: SAVE & INVEST (May 24, 2019, 11:55 AM), https://www.cnbc.com/2019/05/24/25-percent-of-us-adults-have-no-retirement-savings-fed-finds.html.

BAPCPA."[220] The *Johnson* court, relying almost exclusively on the plain language of the text, held that a chapter 13 debtor may make voluntary post-petition contributions to a 401(k), regardless of whether the debtor was making 401(k) contributions at the time of filing.[221] Several bankruptcy courts later adopted the *Johnson* majority's interpretation of the hanging paragraph of Section 541(b)(7).[222]

Under this viewpoint, debtors may fund their 401(k) plan and exclude such contributions from their disposable income, subject to the good faith requirement prescribed in Section 1325(a)(3) and the maximum contribution limits imposed under nonbankruptcy law.[223] In its analysis, the *Johnson* court dodged the application of additional canons of statutory interpretation and, instead, ended its inquiry after looking mainly at the plain meaning of the text.[224] Ignoring other canons of statutory interpretation and relying exclusively on the text's plain meaning unfairly diminishes other relevant provisions of the Code that address similarly situated exclusions and produces an absurd result, given the purpose of the BAPCPA amendments.[225] Since the *Johnson* decision "fail[s] to explain why Congress, if it intended to enact a categorical exclusion from disposable income for retirement contributions, did not use language similar to that of Section 1322(f),"[226] interpreting the hanging paragraph of Section 541(b)(7) demands a more extensive analysis of the text in relation to the entirety of the Code.

Curiously, even though the *Johnson* court acknowledged the utility of Section 1322(f) in determining whether the debtor could exclude money used to repay her 401(k) loans, the court neglected to address Section 1322(f) when deciding whether the debtor could exclude money used for her voluntary 401(k) contributions. The *Johnson* court concluded that the language of Section 541(b)(7) was plain,[227] meaning that the "sole function of the courts is to enforce

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[220] Seafort v. Burden (*In re* Seafort), 669 F.3d 662, 671 (6th Cir. 2012) (quoting Baud v. Carroll, 634 F.3d 327, 357 (6th Cir. 2011) (internal quotation marks omitted)).

[221] Baxter v. Johnson (*In re* Johnson), 346 B.R. 256, 263 (Bankr. S.D. Ga. 2006).

[222] *See In re* Gibson, 2009 LEXIS 2524, at *5 (Bankr. D. Idaho Aug. 31, 2009); *In re* Mati, 390 B.R. 11, 15–17 (Bankr. D. Mass. 2008); *In re* Devilliers, 358 B.R. 849, 864–65 (Bankr. E.D. La. 2007); *In re* Leahy, 370 B.R. 620, 623–24 (Bankr. D. Vt. 2007); *In re* Shelton, 370 B.R. 861, 864–66 (Bankr. N.D. Ga. 2007); *In re* Nowlin, 366 B.R. 670, 676 (Bankr. S.D. Tex. 2007); *In re* Njuguna, 357 B.R. 689, 690-91 (Bankr. D. N.H. 2006).

[223] Johnson, 346 B.R. at 260–61.

[224] *See Id.* at 263 ("Sections 541(b)(7) and 1322(f) both plainly state that these contributions 'shall not constitute disposable income.'").

[225] *See* Seafort v. Burden (*In re* Seafort), 669 F.3d 662, 670 (6th Cir. 2012).

[226] *Id.*

[227] Johnson, 346 B.R. at 263.

[the provision] according to its terms unless the disposition required by the text is absurd."[228] Although the *Johnson* court found nothing absurd about allowing the debtor to repay her 401(k) loans while padding her retirement savings at the expense of her creditors, the use of relevant canons of statutory interpretation weakens the majority's conclusion. The negative-implication canon, *expressio unius est exclusio alterius*[229]—used by the *Prigge* and *Seafort* courts to reject the *Johnson* holding[230]—provides a step in the right direction.

Congress put Section 1322(f)—the provision excluding 401(k) loan repayments from disposable income—in chapter 13, while also placing the hanging paragraph in chapter 5 of the Bankruptcy Code. Although voluntary 401(k) contributions and 401(k) loan repayments are different conceptually, both involve employer-sponsored retirement savings accounts.[231] However, because Congress deliberately placed the two provisions within separate chapters of the Bankruptcy Code, this shared characteristic does not support an assumption that Congress intended for the uniform treatment of voluntary 401(k) contributions and 401(k) loan repayments. Rather, as the *Prigge* and *Seafort* courts conclude, Congress's decision to place the hanging paragraph outside of the confines of chapter 13 is significant.[232] Under the principle that Congress purposefully omits,[233] one could logically infer that there was no intent to exempt post-petition 401(k) contributions from disposable income. Furthermore, the *Seafort* court expanded its analysis beyond merely looking at

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228 *In re* Prigge, 441 B.R. 667, 673 (Bankr. D. Mont. 2010) (citing Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004)); *see* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)).

229 *Expressio unius est exclusion alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.").

230 Prigge, 441 B.R. at 677; Seafort, 669 F.3d at 672.

231 Vanguard defines a 401(k) plan as a "defined contribution plan that allows employees to contribute pre-tax dollars through salary deferral." *Supra* note 76. Fidelity summarizes 401(k) loan repayment as:

> With a 401(k) loan, you borrow money from your retirement savings account. Depending on what your employer's plan allows, you could take out as much as 50% of your savings, up to a maximum of $50,000, within a 12-month period. Remember, you'll have to pay that borrowed money back, plus interest, within 5 years of taking your loan, in most cases.

Thinking of Taking Money out of a 401(k), FIDELITY: FIDELITY VIEWPOINTS (Dec. 30, 2020), https://www.fidelity.com/viewpoints/financial-basics/taking-money-from-401k.

232 *See* Prigge, 441 B.R. at 677; Seafort, 669 F.3d at 672.

233 *See* Keene Corp. v. United States, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.") (internal quotation marks and alterations omitted).

Section 1322(f), turning instead toward other sections of the Bankruptcy Code to provide greater clarity as to the meaning of the hanging paragraph.[234]

Whereas the *Prigge* court held that post-petition 401(k) contributions were disposable income,[235] the *Seafort* court looked at Sections 707(b)(2) and 1325(b)(3), as well as Section 541(b)(7) in the context of Section 541(a), to ultimately conclude that post-petition 401(k) contributions should only be excluded from disposable income if such contributions were made pre-petition.[236] Sections 707(b)(2)(A) and (B) outline several different types of expenses that are permitted to reduce the amount of the debtor's monthly income available to creditors.[237] Notably, voluntary 401(k) contributions are absent from the long list of exclusions that seem to encompass everything from health expenses to education costs.[238] Based on the definition of 401(k),[239] one could argue that nearly every expense listed in Section 707(b)(2)(A) addresses a need that would arise during the span of the debtor's chapter 13 repayment plan. Because a 401(k) plan addresses future needs, it is distinct from the other expenses explicitly listed in Section 707(b)(2)(A). The canon *ejusdem generis* suggests that Congress considers voluntary 401(k) contributions to be outside of the purview of the "reasonable and necessary expenses" deductible from "disposable income."[240]

However, the *Seafort* court departed from the *Prigge* court's analysis because of the very existence of the hanging paragraph of Section 541(b)(7).[241] The fact that Congress specifically added the hanging paragraph to Section 541(b)(7), as opposed to placing the hanging paragraph in a chapter 13 section such as Section 1322(f), provides strong support that the hanging paragraph should be read in the context of Section 541. As discussed previously, Section 541 of the Bankruptcy Code addresses property of the estate.[242] Section 541(a) outlines what property is included in the estate,[243] while subsection (b) outlines what property is not included in the estate.[244] When read together, as the *Seafort*

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234 Seafort, 669 F.3d at 672–74.
235 Prigge, 441 B.R. at 677–78.
236 Seafort, 669 F.3d at 671–74.
237 11 U.S.C. § 707(b)(2)(A)–(B) (2018).
238 *See id.* § 707(b)(2)(A)(ii).
239 *401(k)*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2020).
240 *Ejusdem generis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.").
241 Seafort, 669 F.3d at 672–73.
242 11 U.S.C. § 541 (2018).
243 *Id.* § 541(a).
244 *Id.* § 541(b).

court explains, Sections 541(a)(1) and (b) define property of the estate "by what is included and excluded at a fixed point in time—as of commencement of the bankruptcy case."[245] This interpretation, unlike the *Johnson* majority's reading of Section 541(b)(7), places greater weight on Congress's specific placement of the hanging paragraph.

C. Treating Voluntary 401(k) Contributions as "Reasonably Necessary" for a Debtor's Maintenance Conflicts with the IRS Standards Referenced in the Bankruptcy Code

Several bankruptcy courts have considered the IRS Standards in determining whether post-petition 401(k) contributions are disposable income. The Bankruptcy Court of the Eastern District of Pennsylvania is one example of a judge relying on the IRS Standards in deciding whether a debtor may include post-petition 401(k) contributions as disposable income under Section 707(b)(2)(A)(ii).[246] In *In re Lenton*, the trustee moved to dismiss the debtor's chapter 7 case because the trustee did not consider the debtor's monthly 401(k) retirement plan loan payments to be a necessary expense.[247] The debtor argued that his monthly 401(k) loan repayments constituted involuntary deductions under the other necessary expenses category found in the Internal Revenue Manual.[248] The court observed that the monthly 401(k) repayments were "not a condition of [the] [d]ebtor's job, but rather a condition of his [l]oans."[249]

The debtor also cited the language of then-Form B22A's presumption of abuse worksheet[250] as evidence, contending that "because the Form B22A language cautions that discretionary amounts, such as non-mandatory 401(k) contributions are not included as a [sic] necessary expenses, the converse, i.e., payroll deductions for mandatory 401(k) loan repayments, is an allowable expense."[251] The debtor's argument did not persuade the court, which ultimately

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[245] Seafort, 669 F.3d at 672–73 (agreeing with *McCullers* that "for this reason, the *Johnson* line of cases are not persuasive because they do not read § 541(b)(7) within the larger context of § 541 as a whole").

[246] *See In re* Lenton, 358 B.R. 651, 656–57 (Bankr. E.D. Penn. 2006).

[247] *Id*. at 653–54.

[248] *Id*. at 656–57.

[249] *Id*. at 657.

[250] Line 26 of Form BB2A stated: "Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues and uniform costs. *Do not include discretionary amounts, such as non-mandatory 401(k) contributions.*" U.S. CTS., *Official Form B22A: Statement of Current Monthly Income and Means Test Calculation* 1, 3 (2005) (available at https://www.id.uscourts.gov/Content_Fetcher/?ID=983) (emphasis added). The current version of Form B22A is Form 122A-2. U.S. CTS., *Official Form 122A-2: Chapter 7 Means Test Calculation* (2019) (available at https://www.uscourts.gov/sites/default/files/form_b_122a-2.pdf).

[251] Lenton, 358 B.R. at 657.

found that the "retirement contributions were discretionary and therefore not a requirement of the job."[252] Relying on the Third Circuit's decision in *In re Anes*, the court concluded that the "fact that Debtor took a loan against those funds under loan terms that mandate repayment by payroll deduction does not change the nature of the funds when Debtor repays them."[253]

The *Johnson* approach—which serves as the basis for most courts that exclude post-petition 401(k) contributions from the debtor's disposable income—relies almost exclusively on the plain meaning of the hanging paragraph in Section 541(b)(7). Revisiting the *Johnson* decision, the court neglected to consider the IRS Standards in analyzing whether the Bankruptcy Code permitted the debtor to exclude post-petition 401(k) contributions from disposable income, yet relied heavily on the IRS Standards in assessing the trustee's objection to the debtor's "payments on car loans and leases."[254] The *Johnson* court acknowledged that the IRS National and Local Standards "seem to reflect amounts that Congress deems reasonably necessary regardless of a debtor's actual expenses."[255] As stated earlier, the IRS National Standards account for Food, Clothing and Other Items and "Out of Pocket Health Care Expenses."[256] A review of these provisions reveals they neglect to mention anything even remotely resembling a 401(k) plan contribution, let alone any other kind of retirement account.[257]

The *Johnson* court determined that "[b]y incorporating [the IRS Allowances for Other Necessary Expenses], BAPCPA explicitly authorizes deductions for expenses that were not previously recognized by the Bankruptcy Code."[258] Examples of Other Necessary Expenses include "life insurance premiums, health insurance, health savings accounts, childcare, personal security, phones,

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252 *Id*. The court reasoned that "[i]f future voluntary contributions to the 401k plan are not necessary expenses, it is hard to argue that the replenishment of past voluntary contributions to the 401k account by repaying loans is a necessary expense." *Id*. at 658.

253 *Id*. (citing Anes v. Dehart (*In re* Anes), 195 F.3d 177, 180 (3d Cir. 1999)).

> In finding that repayment of loans from a retirement account should not be deducted from disposable income under § 1325, the Court reasoned that the payments, while classified as debt payments, will increase the debtor's retirement benefits and in such situation "[in] effect, the [loan] payments are contributions to the Debtors' retirement accounts."

Id. (citing Anes, 195 F.3d at 180).

254 Baxter v. Johnson (*In re* Johnson), 346 B.R. 256, 266 (Bankr. S.D. Ga. 2006).

255 *Id*. at 265.

256 IRM §§ 5.15.1.9(1), (5) (Aug. 29, 2018).

257 IRM § 5.15.1.9(1)(A)–(E) (Aug. 29, 2018).

258 *Johnson*, 346 B.R. at 267.

internet, and other education costs."[259] This IRS standard also fails to mention any type of retirement plan contribution. The court then turned to then-Form B22C,[260] which in the court's words, "corresponds to the Code's definition of current monthly income."[261] Referencing the current version of Form B22C, the court concluded that "[t]here is no bad faith where a debtor simply computes [current monthly income] using the Code's mechanical definition."[262] At the same time, the *Johnson* court ignored the "Code's mechanical definition" of Other Necessary Expenses—instructing debtors to "not include discretionary amounts, such as non-mandatory 401(k) contributions"[263] when calculating exclusions from disposable income in its post-petition 401(k) contribution analysis.[264]

The *Prigge* court, however, looked to the IRS guidelines referenced in the Bankruptcy Code to reach the conclusion that voluntary retirement plans are not a necessary expense.[265] The court relied on the Ninth Circuit's opinion in *Egebjerg*, where the court noted "that the IRS guidelines themselves provide that '[c]ontributions to voluntary retirement plans are not a necessary expense.'"[266] Specifically, the court explained:

> We do not hold that [IRM] § 5.15.1.23 is controlling, but that it is useful and persuasive in the context of this case—defining the parameters of [IRM] § 5.15.1.10(1) and what was considered to provide for "health and welfare" at the time Congress cross-referenced the IRM's "Other Necessary Expenses" provisions. . . . By our narrow decision today, we do not mean to imply that the IRS standards have been incorporated wholesale into the Bankruptcy Code or that they control outcomes on other issues.[267]

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259 *Id*. (citing 11 U.S.C. § 707(b)(2) and U.S. CTS., *Official Form B22C: Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income* (2005) (available at https://www.id.uscourts.gov/Content_Fetcher/?ID=992)).

260 The current version of Form B22C is broken up into two separate forms. *See* U.S. CTS., *Official Form 122C-1: Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (2020) (available at https://www.uscourts.gov/sites/default/files/form_b122c-1.pdf); U.S. CTS., *Official Form 122C-2: Chapter 13 Calculation of Your Disposable Income* (2019) (available at https://www.uscourts.gov/sites/default/files/form_b_122c-2.pdf).

261 Johnson, 346 B.R. at 268 (internal marks omitted).

262 *Id*. at 269.

263 U.S. CTS., *Official Form B22C: Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income* (2005) (available at https://www.id.uscourts.gov/Content_Fetcher/?ID=992).

264 *See* Johnson, 346 B.R. at 269.

265 *In re* Prigge, 441 B.R. 667, 676 (Bankr. D. Mont. 2010).

266 *Id*. (quoting Egebjerg v. Anderson (*In re* Egebjerg), 574 F.3d 1045, 1052 (9th Cir. 2009) (internal citations omitted)).

267 *Id*. (quoting Egebjerg, 574 F.3d at 1052).

In *Egebjerg*, the Ninth Circuit examined 401(k) loan repayments in the context of the IRS's Other Necessary Expenses within Section 707(b)(2)(A)(ii) of the Bankruptcy Code.[268] The court found that 401(k) loan repayments were distinguishable from the "fifteen categories of expenses which may be considered necessary under certain circumstances."[269]

To explain why 401(k) loan repayments "do not fit within any of the IRM's listed categories," the *Egebjerg* court reasoned that "the 401(k) loan repayments themselves are voluntary in the sense that [the debtor] can simply ask the loan administrator to treat his outstanding loan balance as an early withdrawal from his 401(k) and thereby relieve himself of a future repayment obligation."[270] Although the Ninth Circuit's inquiry dealt with 401(k) loan repayments as opposed to voluntary 401(k) contributions, the court's rationale highlights an important difference between retirement contributions and other categories "such as child care, education and court-ordered payments such as alimony and child support."[271] In the case of voluntary 401(k) contributions, consider a scenario where a chapter 13 debtor makes this kind of early withdrawal from their 401(k) account after the end of their repayment period. In this scenario, the debtor would essentially prevent unsecured creditors from receiving a portion of their disposable income, while allowing that portion of their income to grow in a 401(k) account. And as the *Egebjerg* court notes, "[d]oing so would have tax consequences, but [the debtor] would retain the use of most of the money."[272]

CONCLUSION

A debtor receives a "head start" if they exit chapter 13 with more resources than are needed to fulfill the goal of consumer bankruptcy: a fresh start. Compared with the pre-BAPCPA consensus view among federal courts that post-petition contributions were part of a debtor's "disposable income" under Section 1325(b)(2), the majority approach bestows debtors with a head start. The vague outlines set forth in the Bankruptcy Code have enabled bankruptcy judges to arbitrarily decide whether voluntary post-petition 401(k) contributions are reasonably necessary for the maintenance or support of the debtor.

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268 *See* Egebjerg, 574 F.3d at 1051 (quoting 11 U.S.C. § 707(b)(2)(A)(ii) ("Under the statutory provisions governing the means test, debtors may deduct, in addition to payments on secured debt, their 'actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service.'")).

269 *Id.*

270 *Id.*

271 *Id.* (citing IRM § 5.15.1.10 (Aug. 29, 2018)).

272 *Id.*

First, excluding voluntary post-petition 401(k) contributions from disposable income gives debtors a "head start" instead of merely a "fresh start." Second, the prevailing interpretation of the "hanging paragraph" of Section 541(b)(7) contradicts other provisions within the Bankruptcy Code. Third, the majority's treatment of voluntary post-petition contributions as "reasonably necessary" for a debtor's maintenance or support conflicts with the IRS Standards referenced by the Bankruptcy Code. Therefore, courts would do well to adopt the *Prigge* or *Seafort* approach to remedy the unintended consequence of the *Johnson* approach—that shielding voluntary post-petition 401(k) contributions from creditors invites abuse by debtors. Moreover, given the fresh start goal of consumer bankruptcy and the current imbalance between debtors and creditors, there lies a strong argument for amending the Bankruptcy Code to clearly indicate that voluntary post-petition 401(k) contributions are disposable income.

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