

The Hanging Paragraph

Bankruptcy eNewsletter by Attorney Gregory A. Holbus

June 2010



Supreme Court Settles (sort of) the issue of projected disposable income.

The U.S. Supreme Court issued its decision in the case of *Hamilton v. Lanning* on Monday, June 7, 2010. The ruling had an 8-1 vote, with only Justice Antonin Scalia dissenting. Doubtless those of you who have been following this newsletter and my blog have noticed the fanatical devotion I have given this case and you're probably relieved that this is likely the last time I will talk about it.

For those of you who haven't been following the story, allow me to give a quick overview. In Chapter 13 Bankruptcy cases, debtors are required to submit a statement of current monthly income (Form B22C, aka the "Means Test") to calculate their projected disposable income and determine how much, if anything, unsecured creditors will be entitled to in the Plan. The inherent problem with the form is that it calculates disposable income for the next 3-5 years based on historical data from 6 months prior. Frequently, this is a cause for disparity, as a debtor's income going forward rarely reflects the debtor's historical income.

Courts across the country have been split on this issue, and divided into two camps: the mechanical approach (which holds that Congress intended to eliminate judicial discretion, did not define "projected disposable income" separately from "disposable income" when it easily could have, and therefore Form B22C is the alpha and omega of calculating disposable income) and the forward-looking approach (which holds that the mechanical approach frequently produces absurd results, that Congress obviously intended something different from the defined term "disposable income" when it added the term "projected", and that other factors ought to be considered).

The U.S. Supreme Court took a plain-meaning approach and agreed that "projected" specifically implied a forward-looking approach. Although projections are often initiated off of historical data, discrepancies and other factors are often added to the calculation to refine the projection into a more accurate number. Specifically, the Court held:

[...] when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtors income or expenses that are known or virtually certain at the time of confirmation. (emphasis added)

What does this mean for debtors? First, the good news. Judges are no longer bound by the rigidity of the Means Test. If a debtor experiences a decrease in income after or just prior to filing for bankruptcy, those circumstances may be factored in computing their disposable income and subsequent Chapter 13 Plan payments.

The bad news. First, this is a double-edged sword. The Court discusses in dicta that debtors might also experience an increase in income after or just prior to filing for bankruptcy. In these cases, the Trustee can object to confirmation, even if the debtor adheres to the Means Test result, if the debtor can afford to pay even more to unsecured creditors.

Second, the Court's holding gives authority to the bankruptcy courts to account for these changes. Many trustees interpret this to mean that they alone (not being judges) do not have the authority to confirm a plan that deviates from the Means Test, which means an objection to confirmation and a hearing every time such a deviation is tried.

Third, although the Court does not discuss the expense side of the equation much, they do mention it in the holding, which means that decisions like *In re: Dionne* (Eastern District of Wisconsin) which allows for the deduction of secured debt payments on the Means Test even though those payments will be discontinued upon filing the bankruptcy petition based on the notion that the payments are contractually due at the time of filing - decisions like these seem to be implicitly reversed.

Fourth and most significantly - if the Court had ruled in favor of the mechanical approach, we'd see a lot less litigation. Instead, now we're going to be litigating the standards of "known or virtually certain" for probably the next 10-20 years.

Nonetheless, we finally have some national direction and uniformity in how projected disposable income is to be determined. This is a solution that I am sure will result in more equitable fairness to both debtors and creditors. But if you are a bankruptcy debtor, do not expect that the standard proposed by the Court will make getting to confirmation any easier.

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