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Oct. 8, 2020, 2:00-3:15 p.m.

American Bar Association: Pro Bono (CLE) Helping Those Who Have Borne the Battle — Working with Veterans, Service Members and Their Families on Financial issues

Hon. Mary Grace Diehl (ret.); U.S. Bankruptcy Court (N.D. Ga.)
Kristina M. Stanger; Nyemaster Goode, P.C.
Hon. Elizabeth S. Stong; U.S. Bankruptcy Court (E.D.N.Y.)
Jessica Hopton Youngberg; U.S. Bankruptcy Court (D. Mass.)

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Restructuring, Insolvency & Distressed Debt Virtual Summit

SEPTEMBER 16 - OCTOBER 27, 2020

Helping Those Who Have Borne the Battle:

Working with Veterans, Servicemembers, and Their Families on Financial Issues

ABA Pro Bono CLE

 Elizabeth S. Stong, Hon. | U.S. Bankruptcy Court (E.D.N.Y.)

 Mary Grace Diehl, Hon. (ret.) | U.S. Bankruptcy Court (N.D. Ga.)

 Kristina M. Stanger | Nyemaster Goode, P.C.

 Jessica H. Youngberg | U.S. Bankruptcy Court (D. Mass.)

Common Civil Legal Issues	
Consumer Debt • Bankruptcy • Credit Report Errors • Debt Collection	**Estate Planning** • Power of Attorney • "Health Care Proxy" • Will
Family • Alimony • Child Custody/Parenting Time • Child Support • Divorce	**Housing** • Eligibility • Foreclosure & Eviction • Landlord/Tenant Disputes • Voucher Termination

Public & Veterans Benefits
• Denied Application
• Termination
• Overpayment
	Records
	• Criminal Records
	• Military Separation
	  • Discharge Upgrade
	  • Other Records Corrections

Identifying Clients Who Have a History of Military Service

Why should you identify clients who have served in the military, as well as clients who have loved ones or household members who have served?

- Might be eligible for financial resources
- Might have additional legal protections
- Might require special considerations before bankruptcy

How should you ask the question?

- "Have you ever served in the military?"

  Asking, "Are you a veteran?," is often insufficient because, among other reasons, "veteran" is inconsistently defined by federal and state government programs, nonprofit organizations, and individuals, leading some who have served in the military not to self-identify as a "veteran."

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Common Direct and Indirect Financial Resources

Cash & Cash Equivalent Benefits • VA Disability Compensation • VA Veterans Pension • SNAP • State Veterans' Benefits	**Housing Subsidies and Supports** • HUD-VASH (Section 8) • SSVF • DRRTP/DCHV • Soldiers' Homes
Health Care • VA Health Care • Vet Centers • Tricare • Medicaid/Medicare	**Education & Training** • Forever GI Bill • Post-9/11 GI Bill • Montgomery GI Bill • Vocational Rehabilitation

Legal Protection Examples

Servicemembers Civil Relief Act (SCRA)
- Definitions (50 U.S.C. §§ 3911, 3920)
- Default Judgments (50 U.S.C. § 3931)
  - Affidavit Requirement
    - Defense Manpower Data Center SCRA Website
      - https://scra.dmdc.osd.mil
    - Appointment of Attorney
  - Stays
  - Vacating Decisions
- Private Right of Action (50 U.S.C. § 4042)

Chapter 53, Title 38: Special Provisions Relating to [Veterans'] Benefits
- Non-assignability and Exempt Status of Benefits (38 U.S.C. § 5301)
- Waiver of Recovery of Claims by the United States (38 U.S.C. § 5302)

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Examples of Pre-Bankruptcy Special Considerations

Is bankruptcy truly necessary?

- "Collection Proof" Debtors
- Disability-Based Student Loan Forgiveness
- Benefit Overpayment Disputes, Waivers, and Payment Plans
- Currently Not Collectible (Hardship)

Could bankruptcy raise or create unusual issues?

- Security Clearance
- VA Home Loan Guaranty
- VA Fraud-Related Overpayment

Select 2019 Bankruptcy Code Amendments

- H.R. 2336, The Family Farmer Relief Act
- H.R. 2938, The HAVEN Act
- H.R. 3304, the National Guard and Reservist Debt Relief Extension Act (NGR – DREA)
- H.R. 3311, the Small Business Reorganization Act (SBRA)

All four were introduced on May 23, 2019, and signed into law on August 23, 2019

- First three were effective immediately
- SBRA became effective in February 2020

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HAVEN Act: Background

ABI Task Force

- Identified need to amend definition of CMI to protect certain military service-related disability and death benefits in bankruptcy
- Drafted, educated and advocated for bankruptcy reform legislation, including **H.R. 2938**, which became **Public Law No. 116-52**

SEC. 2. DEFINITION OF CURRENT MONTHLY INCOME.

Section 101(10A) of title 11, United States Code, is amended by striking subparagraph (B) and inserting the following:

"(B)(i) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent); and

"(ii) excludes—

"(I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);

"(II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

"(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism; and

"(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.".

HAVEN Act: Text

- **Amended 11 U.S.C. § 101(10A) "Current Monthly Income"**
- Prior subparagraph (B) stricken and replaced
- Prior text divided into clauses and subclauses
- Fourth category of funds now excluded from CMI

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HAVEN Act: New CMI Exclusion Text

"Current Monthly Income" now "excludes":

> **any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services**, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

Pub. L. No. 116-52 (to be codified at 11 U.S.C. § 101(10A)(B)(ii)(IV)).

Applying the HAVEN Act

The payment source and basis are key – not an individual's status such as "veteran."

- Title 10 Armed Forces
- Title 37 Pay and Allowances of the Uniformed Services
- Title 38 Veterans' Benefits

Payment Sources

- Department of Defense (DOD) pays under Titles 10 and 37
- Department of Veterans Affairs (VA) pays under Title 38

Payment Type Terminology

- DOD and VA often use confusingly similar terminology for different payment types.
- Informal names for payment types can further complicate matters.

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Examples of Excludable Payment Types

Applying the HAVEN Act

- VA Disability Compensation
  - Paid monthly under Title 38 to veterans who have a service-connected disability
  - Also known as "Service-Connected Disability Compensation" and "Veterans Compensation"
  - Payment amount varies depending upon disability rating (10% to 100%) and whether veteran has "dependents"
- VA Dependency and Indemnity Compensation (DIC)
  - Paid monthly under Title 38 to eligible survivors after a servicemember's in-service or service-connected death or a veteran's death due to a service-connected disability (or circumstances that are equated as such)

Additional examples are provided on a chart that is available at veterans.abi.org.

HAVEN Act: New CMI Exclusion Text

"Current Monthly Income" now "excludes":

any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, **except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.**

- Title 10 Armed Forces
  - Chapter 61: retirement and separation due to disability

Note: Disability Severance Pay, resulting from separation (not retirement) due to disability, is not implicated by the HAVEN Act's Chapter 61 limiting language.

Interpreting the HAVEN Act

Cases

- *In re Price*, 609 B.R. 475 (Bankr. N.D. Tex. 2019)
- *In re Gresham*, 616 B.R. 505 (Bankr. E.D. Mich. 2020)

Articles

- Adam D. Herring & Walter W. Theus, *New Laws, New Duties*, Am. Bankr. Inst. J., Oct. 2019, at 12
- Jessica Hopton Youngberg, *HAVEN Act's Amendment to CMI: Broadly Protecting Military Service-Related Disability and Death Benefits in Bankruptcy*, Am. Bankr. Inst. J., Nov. 2019, at 34
- Stephen C. Matthews & William J. Diggs, *Protecting Disabled Veterans in Need of Financial Assistance*, Am. Bankr. Inst. J., Dec. 2019, at 34

Helpful Resources

Records

- U.S. Dep't of Def. & U.S. Dep't of Veterans Affairs, **eBenefits**, https://www.ebenefits.va.gov/.
- Def. Fin. & Accounting Serv., **MyPay**, https://mypay.dfas.mil/.

Legal

- ABI Task Force on Veterans and Servicemembers Affairs, https://veterans.abi.org.
- Stateside Legal, https://statesidelegal.org.

Benefits

- U.S. Dep't of Def. Warrior Care, https://warriorcare.dodlive.mil/benefits/compensation-and-benefits.
- U.S. Dep't of Veterans Affairs, https://www.va.gov.
  - Office of Gen. Counsel's Accreditation Search, https://www.va.gov/ogc/apps/accreditation/index.asp.
- Def. Fin. & Accounting Serv., Retired Military & Annuitants, https://www.dfas.mil/retiredmilitary.html.
  - Types of Retirement, https://www.dfas.mil/retiredmilitary/plan/retirement-types.html.
  - Estimate Your Retirement Pay, https://www.dfas.mil/retiredmilitary/plan/estimate.html.

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Your help is needed to serve those who have served.

Finding Volunteer Opportunities

- ABI Task Force, https://veterans.abi.org/gethelp.
- American Bar Association (ABA) Home Front Directory of Legal Help, https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/directory-programs/.
- Stateside Legal, https://statesidelegal.org.
- National Veterans Legal Services Program (NVLSP), https://www.nvlsp.org/.
- Swords to Plowshares, https://www.swords-to-plowshares.org/.
- Modern Military Association of America (MMAA), https://modernmilitary.org/portfolio-items/legal/ (serving HIV+ and LGBTQ servicemembers and veterans).

Questions?

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INSOLVENCY 2020

Helping Those Who Have Borne the Battle – Working with Veterans, Servicemembers and their Families on Financial Issues

Program Sponsor: ABA Business Law Section, Pro Bono Services Subcommittee of The Business Bankruptcy Committee

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HAVEN ACT

Public Law 116–52
116th Congress

An Act

Aug. 23, 2019
[H.R. 2938]

To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Honoring American Veterans in Extreme Need Act of 2019.
11 USC 101 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Honoring American Veterans in Extreme Need Act of 2019" or the "HAVEN Act".

SEC. 2. DEFINITION OF CURRENT MONTHLY INCOME.

Section 101(10A) of title 11, United States Code, is amended by striking subparagraph (B) and inserting the following:

"(B)(i) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent); and

"(ii) excludes—

"(I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);

"(II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

"(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism; and

"(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.".

SEC. 3. DETERMINATION OF BUDGETARY EFFECTS.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled "Budgetary Effects of

PAYGO Legislation" for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Approved August 23, 2019.

LEGISLATIVE HISTORY—H.R. 2938:

HOUSE REPORTS: No. 116–169 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 165 (2019):
July 23, considered and passed House.
Aug. 1, considered and passed Senate.

In re Price, 609 B.R. 475 (Bankr. N.D. Tex. 2019)
(Case applying HAVEN Act on calculation of disposable income)

The following constitutes the ruling of the court and has the force and effect therein described.

Signed November 21, 2019

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	§	
	§	
DAVID DEWAYNE PRICE and	§	CASE NO. 19-50149-rlj13
CHERYL ANN PRICE,	§	
Debtors	§	

MEMORANDUM OPINION

On September 19, 2019, the Court held a confirmation hearing on the chapter 13 plan of David and Cheryl Price, the debtors. Robert Wilson, the standing chapter 13 trustee, objects to the Prices' plan and opposes confirmation. He argues that the debtors have not proposed their chapter 13 plan in good faith under 11 U.S.C. § 1325(a)(3); the plan fails the good faith requirement because the Prices propose to keep and pay for three whole life insurance policies, an expense that is not "reasonably necessary" under the Bankruptcy Code. The amount of the monthly premium payments should, instead, be considered as disposable income and thus paid into the plan for unsecured creditors, the trustee says.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(L), and the Court has jurisdiction under 28 U.S.C. § 1334.

The Court approves confirmation and thus overrules the trustee's objection.

I.

A.

The facts are not disputed. The Prices, as joint debtors with above-median income, filed this chapter 13 case on June 21, 2019. Their budget reflects $5,255.35 of monthly take-home wage income, with an additional $964.36 per month in VA disability payments that Mr. Price receives. The Prices' Schedule J discloses the $222.25 that they pay each month for three life insurance policies. One is for Mrs. Price, Mr. Price as beneficiary, with a $30.25 monthly premium and a face value of $25,000. The second whole life insurance policy is for Mr. Price, Mrs. Price as beneficiary, with a $160 monthly premium and a face value of $100,000. The third policy is for their non-dependent son, Mr. Price as beneficiary, with a $32 monthly premium and face value of $50,000. The listed surrender or refund value for the three policies is $358.43, $556.10, and $578.33, respectively, according to the Prices' schedules. The three policies were issued in 2003.

B.

The Prices' proposed plan pays administrative expenses, mortgage arrears, two vehicle liens, tax debt to the Internal Revenue Service (IRS), and an unsecured debt dividend. The plan estimates that unsecured creditors will receive $22,700.96 to be distributed pro rata over the life of the plan, resulting in a 31% dividend to general unsecured creditors. Doc. No. 29. The payments to unsecured creditors are based on the Prices' "projected disposable income." The Prices will make plan payments of $1,900 per month for a period of sixty months for a plan base of $114,000.00.

The Prices' projected disposable income, as calculated through completion of Form 122C-2, is $359.27 per month. *See* § 1325(b)(2). As required, the calculation incorporates the applicable IRS National and Local Standards' deductions and the Prices' income, including Mr. Price's VA disability payments. The Prices *did not* deduct their life insurance premium payments as an expense because whole life insurance does not qualify as a necessary expense under IRS guidelines.

The trustee does not assert that, under § 1325(b), the Prices have improperly determined their disposable income. He instead argues that since the Prices are *not* paying-in the $222.25 per month, their plan fails to dedicate *all* their disposable income for payments to creditors. As a result, he contends that their plan fails the good faith requirement of § 1325(a)(3).

II.

Section 1325(a) of the Bankruptcy Code sets the requirements for confirmation of a chapter 13 plan. That the plan be proposed in good faith is one of the requirements. § 1325(a)(3). Subsection (b) of § 1325 provides that if the trustee or an unsecured creditor objects to the proposed plan, the debtor's "projected disposable income to be received in the applicable commitment period" must be used to make payments to unsecured creditors. The Code defines disposable income as the debtor's current monthly income less amounts reasonably necessary to be expended for the maintenance and support of the debtor and the debtor's dependents. § 1325(b)(2). The expenses—those that are reasonably necessary—are determined under subparagraphs (A) and (B) of § 707(b)(2) for above-median income debtors, such as the Prices. § 1325(b)(3).

In a less than concise fashion, § 707(b)(2)(A) and (B) outlines the debtor's allowable expenses, which are pegged to "applicable monthly expense amounts . . . under the National

Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides." § 707(b)(2)(A)(ii)(I) (There is more to it than this, but this suffices for the issues here.); *In re Gracia*, No. 18-50061, 2018 WL 3726157, at *2 (Bankr. N.D. Tex. Aug. 2, 2018).

The trustee's arguments raise two issues. The first is whether the debtors' Schedule J has any bearing on the § 1325(b) confirmation requirements. (Schedules I and J, which are required to be filed when the case is filed, reflect a debtor's actual monthly income and expenses.) The second issue is whether the Prices fail to satisfy the good faith requirement—despite their technical adherence to the statute and implementing-form Form 122C-2—by proposing a plan that fails to dedicate to creditors both the accumulated cash value of the policies *and* the *$222.25 per month* they pay for whole life policies.

A.

Disposable Income Required Under § 1325(b)

The Code both defines disposable income and tells debtors how to calculate it. If the trustee or an unsecured creditor objects to the debtor's plan, the plan must either pay unsecured debts in full or dedicate all their *projected* disposable income for payments on unsecured debts through the life of the plan. § 1325(b)(1). For above-median debtors—*see* § 1325(b)(3)—their projected disposable income is calculated on required form, Form 122C-2.

Prior to the use of Form 122C-2, as directed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), bankruptcy courts determined a debtor's disposable income by deducting the debtor's expenses on Schedule J from income shown on Schedule I, subject to the court's review of the necessity and reasonableness of the claimed

expenses. *In re Cox*, 393 B.R. 681, 685 (Bankr. W.D. Mo. 2008). With the enactment of BAPCPA, though, Congress developed a standardized, bipartite procedure that eliminated much of the bankruptcy court's discretion in chapter 13 cases of above-median debtors. Now an above-median income chapter 13 debtor must complete Form 122C-1 and Form 122C-2. A completed Form 122C-1 calculates the debtor's current monthly income while a completed Form 122C-2 calculates the debtor's disposable income. This mechanical approach serves as a presumption of the debtor's disposable income that may be rebutted by any party (trustee or debtor) with evidence of known or virtually certain future events that might affect "projected" income. *In re Nowlin*, 576 F.3d 258, 266 (5th Cir. 2009).

The trustee suggests that joint debtors must contribute all their "actual" disposable income—rather than the form-derived amount—to their chapter 13 plan to satisfy the § 1325(b) confirmation requirements. The trustee is asking the Court to return to the pre-BAPCPA evaluation of a debtor's disposable income. This would require the Court to determine what expenses on Schedule J are reasonably necessary and direct that those that are not be "devoted to payments under the plan," even if the debtors did not include such expense as a deduction on their disposable income calculation. Doc. No. 29 at 4. The Court rejects this suggestion. The determination of disposable income under the statute "supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 65 (2011).[1] The purpose of this change was to avoid the "varying and often inconsistent" outcomes. *Id.*

[1] The trustee also submits that the Court should not follow the suggestion of *In re Brown* and compare the cost of term life with whole life insurance in assessing the reasonableness of the expense, because whole life insurance is *not* an allowable, reasonably necessary expense under Form 122C-2. No. 13-35593, 2014 WL 4793243 (Bankr. E.D. Wis. Sept. 24, 2014). The Court agrees that it should not follow *In re Brown*, but not for the reason stated by the trustee. The court in *In re Brown* was assessing the expenses of a below-median income chapter 13 debtor, in which the ad hoc analysis of what are reasonably necessary expenses is required in determining a debtor's disposable income. But

In *In re Uhlig*, the court determined that above-median income chapter 13 debtors are not required to contribute more money to their chapter 13 plans than their projected disposable income to meet the confirmation requirements of § 1325(b). 504 B.R. 916 (Bankr. E.D. Wis. 2014). The sole issue in *In re Uhlig* was whether the cash surrender value increase of a whole life policy over the life of the plan should be considered disposable income to be paid as an additional dividend to unsecured creditors. The court rejected the trustee's argument: "The Bankruptcy Code does not prohibit debtors from saving money during their plan or paying for a type of insurance for which their 'disposable income' equation provides no deduction from income, as long as the debtors' plan proposes to pay no less than their 'disposable income' as determined by section 1325(b)(2)." *Id.* at 918 (citing *Hamilton v. Lanning*, 560 U.S. 505 (2010) (holding disposable income is calculated pursuant to section 1325(b)(2), absent unusual circumstances)).

Courts consistently hold that above-median income chapter 13 debtors may take the standard deductions, notwithstanding their actual expenses. *In re Owsley*, 384 B.R. 739, 743 (Bankr. N.D. Tex. 2008); *see, e.g.*, *In re Smith*, 549 B.R. 188, 191 (Bankr. N.D. Miss. 2016) (confirming an above-median income chapter 13 plan where the debtor's projected disposable income was negative and the plan provided for no distribution to general unsecured creditors, despite the fact that debtor's Schedules I and J reflected that the debtor had surplus monthly net income). The Prices may, therefore, choose to spend less than that allowed by the IRS guidelines and use the extra income for something important to them. With those savings, they may "spend it, save it, or invest it in a whole life insurance policy, but their 'projected disposable

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the Prices are above-median income debtors; the statute *requires* the mechanical, form-driven calculation of disposable income (except for certain secured debt payments, *In re Gracia*, 2018 WL 3726157, at *3). Such a comparison may have some bearing on the good faith analysis, however.

income,' as determined by section 1325(b)(1)(B), does not change because of that decision" and their plan still meets the requirements of confirmation. *In re Uhlig*, 504 B.R. at 920–21. The Prices' chapter 13 plan meets the requirements of § 1325(b).

B.

Good Faith Requirement

Section 1325(a)(3) requires that the debtor's chapter 13 plan be "proposed in good faith." Though arguably not explicit under the statute, good faith is construed as a necessary condition for confirmation of a plan. *See, e.g.*, *Pub. Fin. Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir. 1983). And good faith is determined under the totality of the debtor's circumstances. *Id.*

The parties here are disputing whether the debtors' adherence to § 707(b)(2)(A) and (B) (and Form 122C-2) is sufficient under the circumstances—i.e., their retention of three whole life insurance policies—to satisfy the good faith requirement. As stated, § 1325(a)(3) requires good faith—but good faith is not textually a part of the disposable income requirement of subsection (b). Similarly, § 707(b)(3) states that even when a debtor satisfies subsection (b)(2)(A)—the mathematically derived formula (using prescribed expenses) for determining if a chapter 7 filing is abusive—the court must also consider whether the debtor's filing is otherwise abusive or made in bad faith. *In re Gracia*, 2018 WL 3726157, at *3; *In re Owsley*, 384 B.R. at 750 ("compliance with section 1325(b)(3) and section 707(b)(2)(A) is not dispositive of good faith because good faith embraces more than just lawful compliance with those sections.").

Where the court considers both technical compliance with § 1325(b) and good faith under the totality of the circumstances, "the sufficiency of the assets devoted to the plan is not a basis for a finding of lack of good faith under § 1325(a)(3), unless there is a showing of some sort of manipulation, subterfuge or unfair exploitation of the Code by the debtor." *In re Williams*, 394

B.R. 550, 572 (Bankr. D. Colo. 2008). Good faith is meant to protect the integrity of the bankruptcy process and prevent a debtor from intentionally exploiting the bankruptcy process to delay creditors or achieve an improper purpose. *In re Stanley*, 224 F. App'x 343, 346 (5th Cir. 2007). Although a plan's technical compliance with the Code is presumed to be asserted in good faith, the presumption of good faith may be negated by aggravating circumstances. *In re Owsley*, 384 B.R. at 750. Put another way, a plan is not proposed in bad faith "simply because of the ability to pay more than the means test result. There must be something else to trigger a lack of good faith in proposing a plan." *In re James*, 379 B.R. 903, 908 (Bankr. D. Neb. 2007). A court should therefore rarely find bad faith when a debtor's proposed plan complies with § 1325(b). *In re Devilliers*, 358 B.R. 849, 867 (Bankr. E.D. La. 2007). Without something more, debtors "are not in bad faith merely for doing what the Code permits them to do." *In re Ragos*, 700 F.3d 220, 227 (5th Cir. 2012).

The trustee proffers that a chapter 13 plan is per se bad faith where the debtor proposes to retain a whole life insurance policy, even where the expense is not included as a deduction for their disposable income. But this result is not supported by statute or case law. *See, e.g.*, *In re Rudmose*, No. 10-74514, 2010 WL 4882059, at *7 (Bankr. N.D. Ga. Nov. 8, 2010) (the court declined to find that the purchase of whole life insurance was per se abusive in chapter 7); *In re Mauer*, No. 09-32604, 2009 WL 2461380, at *4 (Bankr. N.D. Ohio Aug. 10, 2009) (finding that a whole life insurance policy was a reasonable expense in a chapter 7 case, while a more expensive term life insurance policy was unreasonable). Specifically, this Court has previously observed that whether or not a chapter 13 plan is proposed in good faith is a question of fact for which the debtor bears the burden of proof, and, as such, "courts are reluctant to define any per se rules applicable to assessing a good faith attempt to propose a plan." *In re Gonzales*, No. 17-

50150, 2018 WL 501332, at *2 (Bankr. N.D. Tex. Jan. 19, 2018). Although the Prices may have more disposable income than calculated on their Form 122C-2, without any aggravating factors to suggest that they are seeking to manipulate the bankruptcy process, there cannot be a finding of bad faith.

The trustee's objection to confirmation is misguided. His objection focuses on the classification of whole life insurance under IRS guidelines and argues that it is not reasonably necessary because it embodies a savings component; he admits that he would not object to term policies as they would be allowable "other-necessary" expense items. But such policies would be allowable expenses that are deducted from the Prices' current monthly income, thus decreasing the projected disposable income for unsecured creditors. The trustee argues that the Prices are saving at the expense of creditors by maintaining whole life insurance policies. But if the Prices obtained term life policies, the amount of the premiums would be made at the expense of those same creditors. Their plan is *not* proposed in bad faith where it pays *more* to unsecured creditors by maintaining the whole life insurance policies.

The Prices have proposed their chapter 13 plan in good faith. Their plan complies with the standards for confirmation under the Code; there is no evidence that their intent to maintain whole life insurance policies manipulates the bankruptcy process.

C. HAVEN Act

Additionally, at the hearing, debtors' counsel brought up the potential applicability of a new bankruptcy law. Mr. Price receives $964.36 in VA disability payments each month. At the time of this bankruptcy filing, June 21, 2019, the HAVEN Act had only been introduced in the House. The HAVEN Act, or the Honoring American Veterans in Extreme Need Act of 2019, is a law that exempts from the calculation of monthly income certain benefits paid by the

Department of Veterans Affairs and the Department of Defense. This law amended 11 U.S.C. § 101(10A) to exclude from the definition of current monthly income certain payments made under title 10, 37, or 38 of the United States Code in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. On July 23, 2019, the HAVEN Act passed the House. On August 1, 2019, the bill passed the Senate. A few weeks later, on August 23, 2019, the HAVEN Act was signed into law by the President. The Act was effective immediately upon enactment.

There is a strong argument that this law applies to pending chapter 13 cases with unconfirmed plans. While no court has said so, experts have argued this interpretation. *See Not Fake News: Congress Enacts New, Sensible Bankruptcy Reform*, 38 Am. Bankr. Inst. J. 10, 77 (2019) (excerpts from an ABI Webinar where Kristina Stanger, a practicing bankruptcy attorney in Iowa and a member of ABI's Veterans Affairs Task Force, stated that since § 1325(b)(1)(B) addresses confirmation plans and relies on the definition of disposable monthly income, the HAVEN Act has immediately changed the meaning of disposable monthly income to exclude disabled veterans' benefits and should be applicable to pending chapter 13 cases with unconfirmed plans). Additionally, on October 1, 2019, new forms for bankruptcy became effective that conform with the HAVEN Act changes, including Official Form 122C-1 (current monthly income).

Here, Mr. Price receives payments that are excluded from current monthly income calculations under the new law. While the Court need not decide whether the HAVEN Act applies to pending chapter 13 cases with unconfirmed plans, the inclusion of such payments, where modification is possible, weighs in favor of the debtors' good faith.

Conclusion

Under § 1325(b)(1)(B), (b)(2), and (b)(3) of the Bankruptcy Code, the Prices' plan, to be confirmed, must meet the expense standards set forth in § 707(b)(2)(A) and (B). Form 122C-2, the use of which is mandated by the Judicial Conference of the United States under Rule 9009 and prescribed by Rule 1007(b)(6), serves to implement § 707(b) (in accordance with § 1325(b)(3)) and thus incorporates the mandated IRS National and Local Standards for the debtors' calculation of disposable income. The calculation "is not only the starting point in calculating above-median-income Chapter 13 debtor's 'projected disposable income,' but in most cases, it is determinative." *In re Hall*, 559 B.R. 463, 469 (Bankr. S.D. Tex. 2016) (citation omitted).

The Code *prescribes* how disposable income must be determined. The Prices' plan complies with the statute and is thus presumptively proposed in good faith. The good faith presumption is rebuttable because "there may be times when debtors commit so little income to repaying creditors, relative to their true ability to pay, that their plans show an intent to manipulate the Code and not to make a good faith effort at repayment." *In re Uhlig*, 504 B.R. at 921. Such is not the case here. The Prices have met their burden of proof; their plan is proposed in good faith.

The Court overrules the trustee's objection to the Prices' chapter 13 plan and approves confirmation.

End of Memorandum Opinion

In re Gresham (Bankr. E.D. Mich., March 10, 2020)
(Ruling on Application of HAVEN Act to Chapter 13 Plan Modification)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION (DETROIT)

In re:	Chapter 13
Ebony L. Gresham,	Case No. 18-56289
Debtor.	Hon. Phillip J. Shefferly

_____/

OPINION REGARDING APPLICATION OF THE HAVEN ACT TO THE DEBTOR'S PROPOSED PLAN MODIFICATION

Introduction

This matter concerns an amendment made to the Bankruptcy Code on August 23, 2019. On that date, Public Law No. 116-52, 133 Stat. 1076, titled Honoring American Veterans in Extreme Need Act ("HAVEN Act"), became law. The issue before the Court is whether the HAVEN Act applies to a proposed plan modification in a Chapter 13 case in which a plan was confirmed before the HAVEN Act became law. For the reasons explained in this opinion, the Court holds that it does.

Jurisdiction

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (L), and (O), over which the Court has jurisdiction under 28 U.S.C. § 1334(a).

Facts

The following facts are not in dispute.

Ebony Gresham ("Debtor") filed this Chapter 13 case on December 4, 2018. At the time she filed this case, the Debtor had a steady job with stable income. In addition, the Debtor received monthly disability benefits from the Department of Veterans Affairs ("VA") as a result of a combat-related injury that the Debtor suffered while serving in the United States military. On March 27, 2019, the Court confirmed the Debtor's plan. The plan required the Debtor to pay her mortgage directly and required bi-weekly payments of $300.00 to her plan. The plan provided for a 100% distribution to the holders of unsecured claims.

On October 29, 2019, the Debtor filed a proposed plan modification ("Plan Mod") (ECF No. 40) to reduce her plan payments to $250.00 bi-weekly and to reduce the distribution to holders of unsecured claims. On November 19, 2019, the Chapter 13 Trustee filed an objection ("Objection") (ECF No. 44). Among other issues, the Trustee noted in the Objection that the Debtor's amended schedules filed in support of the Plan Mod now deduct $1,789.00 of monthly VA disability benefits from the Debtor's disposable income, even though those benefits had not previously been deducted from the calculation of the Debtor's disposable income used to fund her plan payments.

The Court scheduled a hearing on the Plan Mod and Objection, which was adjourned by agreement of the parties until January 16, 2020. At the adjourned hearing, the Debtor and the Trustee told the Court they had resolved all of the issues in the Objection, with one exception: whether the HAVEN Act applies "retroactively."

The Debtor argues that the HAVEN Act applies "retroactively" to bankruptcy cases that were filed prior to the date that the HAVEN Act became law. According to the Debtor, this means that the Debtor's VA disability benefits must be excluded from the calculation of the Debtor's "current monthly income" under § 101(10A) of the Bankruptcy Code. Therefore, the Debtor's VA disability benefits are not part of her "projected disposable income" for purposes of § 1325(b) of the Bankruptcy Code, and need not be contributed to the Debtor's plan. The result is that the Plan Mod, which does not contribute the Debtor's VA disability benefits to her plan, may be approved.

The Trustee argues that the HAVEN Act does not apply "retroactively" to cases — like this one — where a Chapter 13 plan was already confirmed prior to the date that the HAVEN Act became law. According to the Trustee, this means that the Debtor may not now propose a plan modification that does not include her VA disability benefits as part of her "projected disposable income." The result is that the Plan Mod must be denied.

Because the application of the HAVEN Act is an issue of first impression for the Court, the Court set a deadline for the Debtor and the Trustee to brief the issue. The Debtor and the Trustee filed timely briefs and the issue is now ready for decision.

Discussion

The HAVEN Act

Section 101(10A) was added to the Bankruptcy Code by BAPCPA in 2005 to define the term "current monthly income." It starts by casting a wide net to include "the average monthly income from all sources that the debtor receives," but then lists a number of express exclusions, including Social Security benefits, payments to victims of war crimes or crimes against humanity, and payments to victims of international or domestic terrorism. Current monthly income — or "CMI" as it is commonly referred to — is important to individual debtors in bankruptcy cases on a number of issues including: whether it is an abuse under § 707(b) to grant a debtor a Chapter 7 discharge; whether a plan may be confirmed under § 1129(a)(15) for a debtor in a Chapter 11 case; and whether a plan may be confirmed under § 1325(b) for a debtor in Chapter 13. Simply put, CMI is the building block in every bankruptcy case for determining the amount of disposable income of every individual debtor in a bankruptcy case.

The HAVEN Act provides a substantial benefit to veterans who file bankruptcy by adding an express exclusion to CMI for certain compensation, pension, pay, annuity, or allowance paid "in connection with a disability, combat-related injury or disability,

or death of a member of the uniformed services." The legislative history to the HAVEN Act reflects Congress's desire to "make sure our bankruptcy system is serving our veterans," who "deserve an opportunity to get back on their feet with dignity." 165 Cong. Rec. H7215-01, 2019 WL 3307644 (July 23, 2019) (statement of Rep. McBath). The HAVEN Act accomplishes this by treating VA benefits the same as Social Security benefits by excluding them from CMI and, therefore, from an individual debtor's projected disposable income.

Does the HAVEN Act apply only to new cases filed after its passage, or does it also apply to cases pending at the time of its passage?

Before turning to the issue framed by the Debtor and the Trustee — whether the HAVEN Act applies "retroactively" to this case — the Court must first determine whether it applies *at all* to this case, either prospectively or "retroactively."

The HAVEN Act does not state whether it applies only to new cases filed after August 23, 2019 or whether it also applies to cases that were filed before that date. The legislative history to the HAVEN Act is also silent on this question.

However, the Supreme Court has set forth principles that inform federal courts about what law to apply to their decisions in the absence of direction from Congress. In Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974), the Supreme Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or

legislative history to the contrary." This principle suggests that the HAVEN Act applies to any CMI decision that the Court makes after August 23, 2019, regardless of the date of filing of the case in which such decision is made, absent manifest injustice or contrary legislative history.

The Trustee does not identify, and the Court is not aware of, any manifest injustice that will result from bankruptcy courts immediately applying the HAVEN Act to all CMI decisions, without regard to whether those cases were filed before or after August 23, 2019. Nor is there any contrary legislative history. If anything, the legislative history that does exist strongly suggests that there will be a manifest injustice if the HAVEN Act is not immediately applied to the Court's CMI decisions in all cases, given the stated congressional intent to "correct" the Bankruptcy Code's "obvious inequity" in failing to exclude VA benefits from CMI in the same way as Social Security benefits are excluded. 165 Cong. Rec. H7215-01, 2019 WL 3307644 (statement of Rep. McBath).

Further, application of the HAVEN Act to all cases — regardless of when filed — is consistent with the policy of the Judicial Conference. On October 1, 2019, Official Forms 122A-1, 122B, and 122C-1 were all amended to reflect the change to CMI under § 101(10A) made by the HAVEN Act. Lines 9 and 10 of each of these forms now expressly exclude VA benefits from CMI. The Judicial Conference requires use of these Official Forms as of October 1, 2019 for all cases, not just cases filed after

the passage of the HAVEN Act. The Official Forms make no distinction based on the date of filing the case.

To the extent that the Trustee argues that the HAVEN Act only applies to the decisions that the Court makes in cases filed after August 23, 2019, the Court rejects such argument. The Court knows of no manifest injustice that will result if the HAVEN Act is applied to the decisions that the Court makes after August 23, 2019 in cases that were already pending on August 23, 2019. There is nothing in the HAVEN Act, the legislative history to it, or the Official Forms that implement it, to support the proposition that the HAVEN Act only applies to cases that are filed after the passage of the law.

Bradley dictates that the Court apply the HAVEN Act to the decision that the Court must now make in this case — whether to approve the Plan Mod or sustain the Objection — because the HAVEN Act is the law in effect at the time that the Court will render its decision.

Does the HAVEN Act apply "retroactively?

The Trustee argues in the Objection that the Court cannot apply the HAVEN Act to the Plan Mod and the Objection without violating the presumption against "retroactivity" recognized by the Supreme Court.

For support of their respective arguments on "retroactivity," the Debtor and the Trustee both start with Landgraf v. USI Film Products, 511 U.S. 244 (1994), in which the Supreme Court explained that statutory "retroactivity" is disfavored.

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

Landgraf, 511 U.S. at 265 (quoting Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 855 (1990)) (footnote omitted).

"When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." Landgraf, 511 U.S. at 280. Absent an "express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would [i] impair rights a party possessed when he acted, [ii] increase a party's liability for past conduct, or [iii] impose new duties with respect to transactions already completed." Id. "If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." Id.

In their arguments regarding "retroactivity," neither the Debtor nor the Trustee contend that "retroactive" application of the HAVEN Act would increase any party's liability for past conduct or impose new duties on any party with respect to transactions already contemplated. Instead, both the Debtor and the Trustee focus on whether a "retroactive" application of the HAVEN Act would impair the rights that a party possessed when they acted — the first of the three inquiries required by the Supreme Court in Landgraf.

The Debtor posits that her unsecured creditors are the "party" for purposes of this inquiry but argues that they only "possess" a "right" to a distribution under a Chapter 13 plan that is equal to what they would receive in a Chapter 7 liquidation, and no more. According to the Debtor, they do not "possess" a "right" to be paid out of a debtor's VA benefits, either in or outside of a bankruptcy. Therefore, "retroactive" application of the HAVEN Act does not impair any right that they had in the Debtor's bankruptcy case.

The Trustee responds that the Debtor's unsecured creditors do "possess" a "right" — the right to rely on the Debtor's schedules I and J that she filed when she requested confirmation of her plan. Further, the Trustee argues that the Debtor's unsecured creditors acted on that right by not objecting to confirmation of the Debtor's plan. Because the Debtor's confirmed plan was based on schedules that included the Debtor's VA benefits in disposable income, and provided her unsecured creditors with

a 100% distribution, to now apply the HAVEN Act "retroactively" would impair the rights of those unsecured creditors who otherwise could have objected to confirmation of the Debtor's plan if they knew then that the Debtor would later try to pull her VA benefits out of the calculation of her disposable income.

On this point — whether the HAVEN Act applies "retroactively" to confirmation of the Debtor's plan — the Court agrees with the Trustee. When the Debtor sought and obtained confirmation of her plan, the Trustee and her unsecured creditors had no reason to object because the plan provided for a 100% distribution predicated on the Debtor's schedules I and J that included her VA benefits in her calculation of disposable income available to fund her plan. That was consistent with the law defining CMI at that time. To now go back and apply the HAVEN Act "retroactively" to hold that the Debtor's CMI at the time of confirmation of her plan excluded her VA benefits — and therefore vitiates confirmation of the Debtor's plan[1] — is fundamentally unfair because the time has long passed for the Debtor's unsecured creditors to object to confirmation of her plan. The right of those unsecured creditors to object to confirmation would be impaired by a "retroactive" application of the HAVEN Act to confirmation of the Debtor's plan. Therefore, under Landgraf,

[1] The Debtor has not filed a motion for relief from the confirmation order under Fed. R. Civ. P. 60, which is incorporated in Fed. R. Bankr. P. 9024.

"retroactive" application of the HAVEN Act to confirmation of the Debtor's plan is not permitted.

The Debtor makes two other arguments in support of the "retroactive" application of the HAVEN Act, but neither are persuasive. The first is that the HAVEN Act's change to the definition of CMI is procedural rather than substantive. The Debtor notes that Landgraf recognized that changes in procedural rules rather than substantive law do not raise the same concerns about "retroactivity." According to the Debtor, the HAVEN Act is a procedural change only, much like a change to a rule. The second argument is that the HAVEN Act merely corrects a statutory drafting error in the definition of CMI and, therefore, should be applied "retroactively."

Changing the definition of CMI to exclude VA benefits marks a significant, substantive change in the law as to who is eligible to obtain bankruptcy relief. While the revision to the Official Form that recognizes this change may be procedural in nature, the change in the law of CMI that is made by the HAVEN Act is anything but. And even though the legislative history to the HAVEN Act explains that its purpose is to correct an "obvious inequity" in the treatment of VA benefits as compared to Social Security benefits, the Debtor points to no statement in the HAVEN Act or its legislative history to suggest that there was some error in the original drafting of the definition of CMI in § 101(10A) that needed to be corrected. Enacting a law to codify a policy to

eliminate an inequity is not the same as changing a law to correct a drafting error in the text of an existing law.

The Court concludes that there is no basis to deviate from Landgraf's presumption against "retroactivity" by applying the HAVEN Act "retroactively" to confirmation of the Debtor's plan.

Does the HAVEN Act apply
to the Debtor's proposed plan modification?

To recap, the Court holds that the HAVEN Act applies to all CMI decisions made by the Court after August 23, 2019 regardless of the date of filing of the case. And the Court also holds that the HAVEN Act does not apply "retroactively" to upset confirmation of the Debtor's plan. However, neither of these holdings address whether the HAVEN Act applies to the Plan Mod and the Objection. Stated another way, the real issue before the Court is not whether the HAVEN Act applies "retroactively" to confirmation of the Debtor's plan — it does not — but whether the change in the law made by the HAVEN Act provides sufficient grounds to modify the Debtor's plan.

Section 1327(a) of the Bankruptcy Code provides that a confirmed plan is binding on the debtor and each creditor of the debtor. Despite the plain res judicata effect of this provision, § 1329 of the Bankruptcy Code provides that a plan may be modified after confirmation. Section 1329(a) provides that "[a]t any time after confirmation of the plan but before the completion of payments under such plan, the

plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim . . . ." Section 1329(a) goes on to describe how a plan may be modified, for example, to "increase or reduce the amount of payments." Significantly, § 1329 is silent on what showing must be made to modify a confirmed plan.

The Sixth Circuit Court of Appeals has not articulated a standard for determining whether a plan may be modified under § 1329, although it has recognized that bankruptcy courts have discretion to approve or reject post-confirmation plan modifications. Jodway v. Fifth Third Bank (In re Jodway), 719 Fed. Appx. 502, 504 (6th Cir. Jan. 5, 2018) (finding no abuse of discretion where the bankruptcy court denied the modification because the proposed modification was futile).

As explained by the District Court for the Eastern District of Michigan in James C. Warr & Associates, LLC v. Ruskin (In re Mallari), No. 12-11599, 2012 WL 4855180, at *6, n.4 (E.D. Mich. Oct. 9, 2012), there is a split in the case law as to what is required for a post-confirmation modification.

> On the one hand, the Fourth Circuit has adopted the view that, to obtain a post-confirmation modification under § 1329(a), the debtor must show a "substantial and unanticipated change" in financial condition. See In re Murphy, 474 F.3d 143, 149 (4th Cir. 2007) ("[T]he doctrine of res judicata prevents modification of a confirmed plan pursuant to § 1329(a)(1) or (a)(2) unless the party seeking modification demonstrates that the debtor experienced a 'substantial' and 'unanticipated' post-confirmation change in his financial condition.").

> On the other hand, the First, Fifth, and Seventh Circuits have held that no such showing is necessary. See Matter of Witkowski, 16 F.3d 739, 746 (7th Cir. 1994) (holding that "the clear and unambiguous language of § 1329 negates any threshold change in circumstances requirement and clearly demonstrates that the doctrine of res judicata does not apply"); Barbosa v. Solomon, 235 F.3d 31, 41 (1st Cir. 2000) (rejecting the "substantial and unanticipated change" standard as "not contemplated by the statute"); In re Meza, 467 F.3d 874, 877-78 (5th Cir. 2006) (agreeing with Witkowski and Barbosa). See also 7 William L. Norton, Jr., Norton Bankruptcy Law & Practice § 150:2 (3d ed. 2012) (noting circuit split).

The Sixth Circuit Bankruptcy Appellate Panel has taken a lenient approach and held that there is no requirement of an unanticipated or substantial change in circumstances for a plan modification under § 1329. See Ledford v. Brown (In re Brown), 219 B.R. 191, 195 (B.A.P. 6th Cir. 1998) ("Although the court may properly consider changed circumstances in the exercise of its discretion, § 1329 does not contain a requirement for unanticipated or substantial change as a prerequisite to modification."). However, the Sixth Circuit Bankruptcy Appellate Panel has also held that "§ 1327 precludes modification of a confirmed plan under § 1329 to address issues that were or could have been decided at the time the plan was originally confirmed. The practical impact of this conclusion is that modification under § 1329(a) will be limited to matters that arise post-confirmation." Storey v. Pees (In re Storey), 392 B.R. 266, 272 (B.A.P. 6th Cir. 2008) (citing Cline v. Welch (In re Welch), No. 97-5080, 1998 WL 773999, at *2 n.1 (6th Cir. Oct. 11, 1998)).

In this case, the Plan Mod is not based on any factual change in the Debtor's circumstances — such as a loss of job, or increased expenses for a medical condition. Here, the Plan Mod is based on a change in the law made by the HAVEN Act after the Debtor confirmed her plan. However, if applied to the calculation of the Debtor's CMI for purposes of the Plan Mod, it would obviously have a substantial impact on the Debtor's financial circumstances by excluding $1,789.00 of VA benefits each month. The passage of the HAVEN Act and its change in the definition of CMI is not something that the Debtor or the Trustee could have anticipated when the Debtor's plan was confirmed. It could not have been litigated at the confirmation hearing, as it only became law post-confirmation. The change that it works is not something that the Debtor somehow contrived to get out from under the terms of her confirmed plan. And there's nothing unfair to the Debtor's creditors about now applying the HAVEN Act to the Plan Mod going forward, as all of those creditors have been given notice and none have objected.

The Court holds that the HAVEN Act provides a legitimate reason for a modification — sufficient under § 1329 and the case law in the Sixth Circuit — to the Debtor's plan for its duration. To hold otherwise would be to shackle the Debtor going forward to a policy — requiring the inclusion of VA benefits in CMI — that Congress has expressly rejected as an "obvious inequity." And to what end? If the Plan Mod is not approved, the Debtor could voluntarily dismiss this case under § 1307(b) and file a

new case with no question about the applicability of the HAVEN Act to her CMI, but with more legal fees and delay to erode any distribution to creditors and a fresh start for the Debtor.

Conclusion

The HAVEN Act applies to the Plan Mod. However, the Court's holding that the HAVEN Act applies to the Plan Mod does not necessarily mean that the Plan Mod is approved. The Plan Mod must meet all of the requirements of § 1329(b)(1). That subsection states that § 1322(a), § 1322(b) and § 1323(c), and "the requirements of section 1325(a)" all apply to a plan modification under § 1329(a). By the time of the hearing on January 16, 2020, the Debtor and the Trustee told the Court that they had resolved all of the issues raised by the Plan Mod and the Objection — save the legal issue of the application of the HAVEN Act. If that remains the case, the Debtor and the Trustee shall submit an order approving the Plan Mod. If there are any remaining open issues under the Objection, the Debtor and the Trustee shall notify the Court and the Court will schedule a hearing on those issues. In the meantime, the Court will enter a separate order consistent with this opinion.

Signed on March 10, 2020

/s/ Phillip J. Shefferly
Phillip J. Shefferly
United States Bankruptcy Judge

Veterans: Benefits, Bills, and Bankruptcy
(written materials for E.D. Missouri Bankruptcy Court Seminar on September 6, 2019)

E.D. of Missouri Bankruptcy Court Seminar
September 6, 2019

Veterans: Benefits, Bills, and Bankruptcy

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I. Introduction to the Task Force and Its Efforts

Driven by the epidemic rates of suicides among our military (and friends), in April 2018, the American Bankruptcy Institute ("ABI") created a Task Force on Veterans and Servicemembers Affairs (the "Task Force").[1] The Task Force immediately set out to make a difference to provide financial hope to our servicemembers who are willing to make the ultimate sacrifice of their lives for our freedom.[2] The Task Force is made up of volunteers from the public and private sector, including judges, attorneys, law clerks, financial professionals, and professors. Many members of the Task Force have an affiliation with the military, including retirees, veterans, currently serving Reserve Component members, and military family members.

The Task Force first took on an educational and legislative mission to address the Bankruptcy Code provisions that put servicemember and veteran disability

[1] A Department of Defense study in 2017 estimated 20 servicemembers commit suicide each day. PRUITT ET AL., DODSER DEPARTMENT OF DEFENSE SUICIDE EVENT REPORT CALENDAR YEAR 2017 ANNUAL REPORT 37 (2018) available at https://www.dspo.mil/Prevention/Data-Surveillance/DoDSER-Annual-Reports/ (last visited Aug. 28, 2019); *see also* Jennifer Steinhauer, *V.A. Officials, and the Nation, Battle an Unrelenting Tide of Veteran Suicides*, THE NEW YORK TIMES (Apr. 14, 2019) https://www.nytimes.com/2019/04/14/us/politics/veterans-suicide.html. A special tribute is made to our fallen warrior Captain Luis Carlos Montalván and his dog, Tuesday, for their work for Veterans, service dogs and for inspiring the Task Force's formation. Read about their story here: https://www.amazon.com/Until-Tuesday-Wounded-Warrior-Retriever/dp/1455853577.

[2] *Mission Statement*, VETERANS AFFAIRS TASK FORCE, https://veterans.abi.org/ (last visited Aug. 28, 2019); *see also Members*, VETERANS AFFAIRS TASK FORCE, https://veterans.abi.org/taskforce-members (last visited Aug. 28, 2019). The panelists would like to thank the members of the ABI Task Force for their hard work since its inception and congratulate them on the completion of their first mission.

benefits at risk.[3] The Task Force's efforts resulted in broad support[4] and eventual enactment of the HAVEN Act on August 23, 2019.[5]

The Task Force's second major effort focuses on developing a military and veteran specific version of the C.A.R.E. program to assist with the financial education of those serving and who have served.[6] Other efforts may include Fair Debt Collection Practices Act, the Servicemembers Civil Relief Act or other areas that overlap financial need and military service.

II. The Military's Complex Relationship with Servicemember and Veteran Financial Difficulties

The military has long recognized the precarious financial situation of its members.[7] Servicemembers and their families agree by acknowledging fears regarding financial struggles, both while in service and after military service is completed.[8] Yet, the military considers financial issues as grounds to revoke or deny

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[3] *Projects*, VETERANS AFFAIRS TASK FORCE, https://veterans.abi.org/ (last visited Aug. 28, 2019).
[4] *See Cornyn, Baldwin Bill to Help Veterans Experiencing Bankruptcy Passes Senate*, JOHN CORNYN UNITED STATES SENATOR FOR TEXAS (Aug. 2, 2019) https://www.cornyn.senate.gov/content/news/cornyn-baldwin-bill-help-veterans-experiencing-bankruptcy-passes-senate; *see also Baldwin, Cornyn Bipartisan Legislation to Support Veterans Experiencing Bankruptcy Heads to President's Desk HAVEN Act will amend current bankruptcy law to protect veterans experiencing financial hardship*, TAMMY BALDWIN UNITED STATES SENATOR FOR WISCONSIN (Aug. 1, 2019) https://www.baldwin.senate.gov/press-releases/haven-act-passes-congress.
[5] *See President Signs the Honoring American Veterans in Extreme Need (Haven) Act of 2019 Into Law*, AMERICAN BANKRUPTCY INSTITUTE (Aug. 23, 2019) https://www.abi.org/newsroom/press-releases/president-signs-the-honoring-american-veterans-in-extreme-need-haven-act-of. Although the panelists recognize that the terms "servicemember" and "veteran" have distinct definitions related to certain benefits and qualifications of service, these terms are generally used interchangeably for purposes of these materials, unless otherwise noted. *See* 11 U.S.C. Section 101(10A) (defining the applicability of the exception by the source of the income and not by a requirement to be a "Veteran.").
[6] *Projects*, *supra* note 3.
[7] Quentin Fottrell, *Why veterans have more money problems*, MARKETWATCH (Oct. 28, 2014) https://www.marketwatch.com/story/why-veterans-have-more-money-problems-2014-05-21.
[8] *Blue Star Families*, *Military Family Lifestyle Survey Summary of Trends & Resulting Impact* (2019) available at https://bluestarfam.org/wp-content/uploads/2019/02/TrendSummary_2009-2018-DIGITAL-FINAL.pdf (last visited Aug. 28, 2019).

a security clearance,[9] deny training,[10] or prevent a change of duty station.[11] However, the numerous factors that contribute to financial problems prevent a single, easy solution and fuel mental health issues.[12]

The veteran community overrepresent those who file bankruptcy.[13] Veterans make up less than 11% of the nation's population, and yet almost 15% of both chapter 7 and chapter 13 filers identify as veterans.[14]

There is no one single reason for the overrepresentation in bankruptcy (or suicidal rates). However, a veteran living with a disability faces a higher likelihood of reduced income over the course of his or her life once military service is completed.[15] This possibility of reduced earning capacity is frequently referenced as the main purpose for disability payments.[16]

To initially seek disability benefits from the U.S. Department of Veterans Affairs ("VA") a veteran must file a claim with the VA.[17] In an attempt to reduce public fury at the extreme wait-times faced for disposition of veterans' claims, the VA began providing claim information including details regarding pending and backlogged claims.[18] However, there are significant concerns that the reported

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[9] 10 C.F.R. § Pt. 710, App. A.; *In re Anderson*, 84 B.R. 426, 427-28 (Bankr. E.D. 1988); *In re Applegate*, 64 B.R. 448, 449 (Bankr. E.D. 1986).
[10] *Anderson*, 84 B.R. at 428.
[11] *Applegate*, 64 B.R. at 449.
[12] BLUE STAR FAMILIES, *supra* note 9.
[13] *See* Jonathan Fisher, *Who Files for Personal Bankruptcy in the United States?,* Center for Economic Studies 17-54, September 2017, available at https://www2.census.gov/ces/wp/2017/CES-WP-17-54.pdf (last visited Aug. 28, 2019).
[14] *Id.*
[15] Shawn Snow, *Supreme Court rules in veteran's favor in closely watched divorce settlement case*, Military Times (May 17, 2017) https://www.militarytimes.com/pay-benefits/2017/05/17/supreme-court-rules-in-veteran-s-favor-in-closely-watched-divorce-settlement-case/.
[16] *Id.*
[17] 38 U.S.C. § 5101 (Westlaw, all code citations current through Pub. L. No. 116-54 unless otherwise stated).
[18] *Veterans Affairs Backlog Files Backlog Files Stacked So High, They Posed Safety Risk to Staff*, PBS NEWS HOUR (Apr. 2, 2013) https://www.pbs.org/newshour/nation/veterans-affairs-backlog-files-were-stacked-so-high-they-posed-a-safety-risk-to-va-staff-1.

statistics are not accurate, particularly for the backlogged claims.[19] The VA defines backlogged claims as those pending more than 125 days.[20] As of August 24, 2019, the VA had over 374,271 claims waiting for a resolution.[21] Of those, more than 70,000 hold a classification of backlogged.[22]

VA benefits take a variety of forms.[23] For example, colloquially known as "disability payments," the VA pays compensation benefits in the form of tax-free funds to veterans based on ratings assigned to service-connected disabilities.[24] Qualified dependents may also receive payments under the compensation heading.[25] Total disability is not a requirement for payment of compensation benefits.[26] Pension benefits—a needs-based benefit paid by the VA—focus on ensuring that veterans or their surviving dependents reach a minimum level of income.[27]

In Missouri, over 96,000 veterans or qualified dependents actively received compensation benefits at the end of fiscal year 2018.[28] Of these recipients, 36.9% are under the age of 55.[29] More than 6,000 veterans or surviving dependents living in

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[19] Leo Shane III, *Watchdog report: The VA benefits backlog is higher than officials say*, MILITARY TIMES (Sept. 10, 2018) https://www.militarytimes.com/news/2018/09/10/watchdog-report-the-va-benefits-backlog-is-higher-than-officials-say/.
[20] *Veterans Benefits Administration Reports Characteristics of Claims*, U.S. DEPARTMENT OF VETERANS AFFAIRS (last updated Aug. 24, 2019) https://www.benefits.va.gov/REPORTS/characteristics_of_claims.asp (last visited Aug. 28, 2019).
[21] *Id.*
[22] *Id.*
[23] *See* U.S. DEPARTMENT OF VETERANS AFFAIRS VETERANS BENEFITS ADMINISTRATION, ANNUAL BENEFITS REPORT FISCAL YEAR 2018 7-11 (2019) available at https://www.benefits.va.gov/REPORTS/abr/ (last visited Aug. 28, 2019).
[24] 38 U.S.C. §§ 1104, 1110, 1114(a)-(j), 1115, 1131, 1134; *see also* U.S. DEPARTMENT OF VETERANS AFFAIRS VETERANS BENEFITS ADMINISTRATION, *supra* note 24, at 38.
[25] 38 U.S.C. §§ 1304, 1310-1318; *see also* U.S. DEPARTMENT OF VETERANS AFFAIRS VETERANS BENEFITS ADMINISTRATION, *supra* note 24, at 38.
[26] 38 U.S.C. §§ 1114, 1134, 1155; *see also* U.S. DEPARTMENT OF VETERANS AFFAIRS VETERANS BENEFITS ADMINISTRATION, *supra* note 24, at 38.
[27] 38 U.S.C. §§ 1502, 1513, 1521, 1541-43, 5312; *see also* U.S. DEPARTMENT OF VETERANS AFFAIRS VETERANS BENEFITS ADMINISTRATION, *supra* note 24, at 119.
[28] *See* U.S. DEPARTMENT OF VETERANS AFFAIRS VETERANS BENEFITS ADMINISTRATION, *supra* note 24, at 38.
[29] *Id.*

Missouri actively received pension benefits at the end of fiscal year 2018.[30] Of these recipients, 21.5% are under the age of 65.[31]

The long-standing concerns about the servicemembers and veterans with financial difficulties manifested through consumer protection laws at the state[32] and federal level,[33] the creation of the Office of Servicemember Affairs within the Consumer Financial Protection Bureau ("CFPB"),[34] and special protections for military and veteran compensation.[35]

A. Consumer Protection Laws

Consumer protection laws such as the Military Lending Act[36] and the Servicemembers Civil Relief Act[37] focus on protecting those serving on active duty and dependents. However, these laws are not limited to active duty service as relief is provided through remedies in "the civilian world" for those who, for example, realize their interest rates violated state or local laws.

B. Office of Servicemember Affairs

The Consumer Financial Protection Bureau's Office of Servicemember Affairs provides financial education resources, overseas complaints by servicemembers, and operates to assist with data collection on violations of laws such as the Military

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[30] *Id.*
[31] *Id.*
[32] *See e.g.,* 330 ILCS 63/13.
[33] *See e.g.,* 10 U.S.C. § 987.
[34] 12 U.S.C. § 5491; *see also Office of Servicemember Affairs*, CONSUMER FINANCIAL PROTECTION BUREAU, https://www.consumerfinance.gov/practitioner-resources/servicemembers/ (last visited Aug. 28, 2019). https://www.consumerfinance.gov/practitioner-resources/servicemembers/. The panelists also want to provide a special Thank You to Mrs. Holly Petraeus for her work as the first Assistant Director of Servicemember Affairs for the CFPB and for her work on behalf of the Task Force.
[35] 38 U.S.C. § 5301; *see also* 10 U.S.C. § 1408.
[36] 10 U.S.C. § 987; *see also* 32 C.F.R. § 232.1
[37] 50 U.S.C. §§ 3901-4043.

Lending Act.[38] The most recent annual report highlighted debt collection concerns, including problems with debts owed to the VA, telecommunications, and student loans.[39]

C. Special Protections for Military and Veteran Compensation

Anti-assignment provisions for veteran compensation are one of the strongest protections against debt collection available.[40] Federal law also prevents VA disability from being considered a marital asset.[41] The Supreme Court case law even recently clarified that when a veteran waives previously awarded retirement pay—that was divided subject to an order for alimony—to receive new or an increase in disability payments, those disability payments are unavailable to be taken by a state court no matter the impact on a former spouse.[42]

The protections for veteran compensation, however, did not cover the disability payments when a veteran filed for bankruptcy after BAPCPA in 2005. Section 101(10A) of the Bankruptcy Code cast a wide net to consider all forms of income received by the debtor, including amounts paid by others for household expenses for the benefit of the debtor or the debtor's dependents.[43] Only three sources of income received the status to be excluded: (1) funds received through the Social Security Act (the "SSA"); (2) funds received by victims of war crimes directly related to the victim's status of such a crime; and (3) funds received by victims of acts of terrorism directly related to the victim's status of such terrorism.[44] One of the Task Force's first missions included taking on amending this definition.

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[38] *What is the Military Lending Act and what are my rights?*, CONSUMER FINANCIAL PROTECTION BUREAU, https://files.consumerfinance.gov/f/documents/cfpb_military-lending-act-know-your-rights_handout.pdf (last visited Aug. 28, 2019).
[39] BUREAU OF CONSUMER FINANCIAL PROTECTION, *Office of Servicemember Affairs Annual Report* (Jan. 2019) available at https://files.consumerfinance.gov/f/documents/cfpb_osa_annual-report_2018.pdf (last visited Aug. 28, 2019).
[40] 38 U.S.C. § 5301. Many state statutes also keep these assets from the reach of creditors.
[41] 10 U.S.C. § 1408.
[42] *Howell v. Howell*, 137 S.Ct. 1400 (2017).
[43] 11 U.S.C. § 101(10A) (prior to Aug. 23, 2019).
[44] *Id.*

Benefits received through the VA received no exclusion from the calculation. While it was believed that the exclusion of VA benefits was an unintentional oversight, bankruptcy courts found the arguments unpersuasive.[45]

Bankruptcy practitioners, veterans' advocates, and those they represented were left scratching their heads. Few legal minds could reconcile how payments for disabilities could be treated in such a discriminatory way, simply due to the origination of the funds: VA vs. SSA. Eventually recognizing this discrimination helped lead to the HAVEN Act's support and passage.

III. The HAVEN Act

For the first time since 2005, the Bankruptcy Code was significantly amended. Four bills impacting the Bankruptcy Code passed through Congress and were signed into law on August 23, 2019. Honoring American Veterans in Extreme Need Act — known as the HAVEN Act, was one of those bills and codifies the success of ABI Veteran Task Force's first mission.[46]

A. The HAVEN Act's journey to law

Since BAPCPA's passage, Department of Defense ("DOD") and VA disability payments have been included in a debtor's "current monthly income" and required to be disclosed on the Means Test. Previously, the only exceptions to income were: (1) Social Security Benefits, (2) income received by victims of war crimes, and (3) income received by victims of terrorism.[47] The HAVEN Act sought to rectify the BAPCPA's oversight of servicemember and veteran benefits.

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[45] *In re Brah,* 562 B.R. 922 (Bankr. E.D. Wis. 2017); *In re Hedge*, 394 B.R. 463 (Bankr. S.D. Ind. 2008); *In re Waters,* 384 B.R. 432 (Bankr. N.D. W.Va. 2008); *In re Wyatt*, 2008 WL 4572506 (Bankr. E.D. Va. Oct. 10, 2008); *In re Redmond*, 2008 WL 1752133 (Bankr. S.D. Tex. Apr. 14, 2008).
[46] Pub. L. No. 116-52.
[47] 11 U.S.C. § 101 (10A) (prior to Aug. 23, 2019).

Starting in the fall of 2018, the Task Force worked to educate[48] and advocate for the passage of the HAVEN Act through a grassroots campaign, submitting materials for the Congressional Record and testimony before Congress.[49] Following all volunteer efforts, the HAVEN Act was introduced in March 2019 in the Senate by Senator Tammy Baldwin and originally co-sponsored by Senator John Cornyn, along with ultimately over 40 bipartisan co-sponsors.[50] A few weeks later, a companion bill was introduced by Representative Lucy McBath and Representative Greg Steube, which also gained tremendous bi-partisan support.[51]

In order to pass the bill as quickly as possible, the text of the HAVEN Act was also offered and accepted as an amendment to the National Defense Authorization Act for Fiscal Year 2020 (the "NDAA") for both the Senate and House.[52]

On July 23, 2019, the standalone HAVEN Act was reported out of the House Committee on the Judiciary and passed in the House that day. It passed in the

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[48] *See e.g.,* Jay Bender, Elizabeth Gunn, and John Thompson, *Defending Our Veterans*, 37 AM. BANKR. INST. J. 12 (Nov. 2018). This article is only one sample of efforts by Task Force members to educate. Other Task Force members gave presentations and drafted articles regarding the issue throughout the last 18 months. *See, e.g.,* John W. Ames of Bingham Greenebaum Doll (Louisville) Discusses the Work of the Veterans Affairs Task Force With ABI's Bill Rochelle, VETERANS AFFAIRS TASK FORCE (Apr. 12, 2019) https://veterans.abi.org/multimedia.

[49] *See Holly Petraeus Testimony before the United States House Judiciary Subcommittee*, VETERANS AFFAIRS TASK FORCE (June 25, 2019) https://veterans.abi.org/multimedia. Much like a military operation, a Tiger Team of five from the Task Force took the education and lobbying efforts tactically to the Hill. This Tiger Team was comprised of advocate Mrs. Holly Petraeus, attorney Jay Bender of Bradley Arant Boult Cummings LLP of Birmingham, Alabama, John Thompson of McGuireWoods LLP in Washington D.C., Kristina Stanger of Nyemaster Goode, P.C. in Des Moines, Iowa and Rachel Albanese of DLA Piper in New York. Their efforts culminated with Holly Petraeus's Testimony before the United States House Judiciary Subcommittee on June 25, 2019, available at https://veterans.abi.org/multimedia.

[50] Joshua Axelrod, *Bankrupt vets can lose their disability benefits. This new effort would protect them.* MILITARY TIMES (Mar. 7, 2019) https://rebootcamp.militarytimes.com/news/transition/2019/03/07/bankrupt-vets-can-lose-their-disability-benefits-this-new-effort-would-protect-them/; *see also Cornyn, supra* note 4; *see also Baldwin, supra* note 4.

[51] *Bipartisan Bill Supporting Veterans Experiencing Financial Hardship, Led by Rep. Lucy McBath, Passes House*, U.S. Representative Lucy McBath Georgia's 6th Congressional District (Jul. 23, 2019) https://mcbath.house.gov/press-releases?ID=A9BB4630-9A74-44F9-89AB-A08124D618D0. .

[52] H.R. 2500, 116th Cong. (2019); H. Rept. No. 116-120 (2019); S.1790, 116th Cong. (2019); S. Rept. 116-48 (2019). The NDAA has been held for cross referencing between the chambers of Congress since early July 2019. *Id.* H.R. 2500; S. 1790.

Senate on August 1, 2019, without amendment. On August 13, 2019 the HAVEN Act was presented to the President for consideration for signature.[53] The HAVEN Act was signed into law on August 23, 2019.[54] The HAVEN Act is effective immediately upon the date of signing.

The HAVEN Act overturned the bankruptcy court rulings that held disability payments must be included in the current monthly income. Now disability payments received from the DOD and VA will be treated identically to payments received from the SSA and are excluded from current monthly income.

B. What is the exact text of the new fourth exclusion?

> (IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

C. What benefits are now going to be excluded from the definition of current monthly income?

Understanding servicemember and veteran compensation can be overwhelming and guidance is found in multi-volume handbooks for those that assist our servicemembers. As a quick reference, we provide **Addendum A**, which may get you started in evaluating which benefits are covered by the HAVEN Act and now excluded from current monthly income.

D. What implications does this bill have for the military and veteran community?

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[53] 165 Cong. Rec. H7504-01 (2019). H.R. 2938; S. 679.
[54] *See President Signs the Honoring American Veterans in Extreme Need (Haven) Act of 2019 Into Law*, *supra* note 5.

The law is effective immediately and is intended to apply retroactively to cases currently pending.[55] HAVEN provides the requested relief clamored for by veterans' advocates for years. DOD and VA disability payments that fall under the exclusion will be removed from consideration on the Means Test and are excluded from "current monthly income" for any other consideration of the Bankruptcy Code.[56] It is anticipated that servicemembers (active, reserve or retired) in financial need will now be able to fully avail themselves of other options for relief under the Bankruptcy Code and will be entitled to retain their disability benefits instead of pledging them to creditors in a Chapter 13 plan. Thus, relieving the extended stressors of financial distress and impacts on mental health and potentially a servicemembers' security clearance or training opportunities.

HAVEN is changing lives already. One servicemember's counsel shared that HAVEN is already going to save his clients over $200,000 in their 5-year Plan. Another practitioner located outside of Fort Hood, Texas, reports that she has veterans "lined up" to take advantage of this relief. Another servicemember family in California, who has been a personally motivating example to the Task Force, is submitting a new Chapter 13 plan on the day these materials are being drafted with a huge relief off of their shoulders. Many asked the "scope of the issue" during the legislative process. We know you would agree that impacting one person is enough.

E. What practical considerations should bankruptcy/consumer law practitioners think about with the passage of this law?

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[55] *See* H.R. Rep. 116-169 describing the need to bring DOD and VA disability payments in line with SSA payments based on Senator Edward Kennedy's rationale for SSA's exclusion in 2005. Senator Kennedy specified, and the H.R. cited, in their support for the HAVEN Act, the need for the Bankruptcy Code to adequately reflect Congress's intent to allow people to protect their benefits and their dignity. Further, legislative history that supports retroactive intent comes from 165 Cong. Rec. H7215-01 from July 23, 2019 when the House worked to pass the bill and the conversation discussed the immediate discharges veterans miss out on and the obvious inequity the HAVEN Act corrected to bring DOD and VA disability payments in line with SSA payments, specifically treating the payments the "same."

[56] 11 U.S.C. § 101(10A).

The practical considerations of the HAVEN Act are still coming to light and the panel, and ABI Veteran Task Force would like to hear from practitioners, judges, educators, professionals and advocates on this issue. We provide the following as initial guidance:

1. First, remember that the HAVEN Act applies to veterans, servicemembers and families that receive benefits. The critical fact is the source of the benefit, not the "veteran" status of the recipient.

2. Second, Debtors' attorneys should reach out to clients that are currently in Chapter 13 who are receiving DOD and VA disability payments for possible consideration for conversion, modification of their Plan or dismissal and refiling. The law does not specifically address the right to convert a case, however, 11 U.S.C. § 1307(a), may provide the debtor this relief to move to a Chapter 7.

3. Third, do you need to update Schedule I? The authors submit that Schedule I and bankruptcy forms, programs or systems that do calculations need to be updated to reflect the change in law.

4. Fourth, consider whether HAVEN may impact an analysis or test in your local district. For example, in the E.D. of Missouri, there is a Local Rule applicable in Chapter 13 cases that **requires** disclosure of "material change[s] in the debtor's disposable income during the life of the plan. This duty to disclose is a continuing duty throughout the life of the plan." L.R. 2015-2. Does the HAVEN Act change the disclosure? Arguably, HAVEN's exemption now qualifies as a material change in disposable income, so it should be reported even if no conversion is

sought. Other districts may have similar requirements related to "current monthly income."

Other general considerations may include:

With Your Client

- Implementing a new intake checklist for your practice. The panelists have attached **Addendum B** as an example.
    - Asking a client if he or she is a veteran, spouse, loved one or household member has ever served in the military.
    - Ask a client if he or she has a pending VA claim or is expecting to file a VA claim—new or supplemental.
        - Back pay of benefits can be substantial, and the Trustee may be curious as to the origin of the funds, even if they are now excluded from current monthly income calculation.
- Ask for and disclose information about pending DOD disability-related proceedings and benefits.
    - The HAVEN Act limits the excludability of DOD disability retired pay from current monthly income and could require additional analysis to determine the amount, if any, that can be excluded.
- Learn how the DOD and VA payments appear on bank statements.
    - Ex. VA disability compensation payments listed differently than DOD payments of Combat-Related Special Compensation. They appear as separate deposits on bank statements. **Both** are now excluded from current monthly income.
    - Benefits will be noted on a DoD Leave and Earning Statement or VA claim and payment history and is accessible through the servicemembers' eBenefits account at: https://www.ebenefits.va.gov/ebenefits/homepage
- Does the client have the original award letter or annual "pay advice" document?
    - If not, the client might obtain the same or similar documents through ebenefits.va.gov and mypay.dfas.mil.
    - Does your client have an eBenefits account? You can review their claims and benefits' statements on eBenefits.
- Encourage your client to seek a Veteran Clinic or Veteran Service Organization (like AMVETS, VFW, American Legion or their county Veteran representative) and grow that support relationship.
- Will the client need to sign an affidavit explaining the origin of the funds?

With the Court and Trustees

- Has the local court issued an interim rule regarding procedure or addressing the Means Test changes or conversions? Generally FRBP 1019; specifically in the EDMO look to L.R. 1019.
- What debts remain outstanding? What has already been paid through the Chapter 13?
- Is converting the case going to endanger a secured asset of the debtor?
- Is the debtor going to benefit from remaining in a Chapter 13 due to the super discharge?
- Will a new 341 Hearing be required?
- Learn what the Trustee needs for proof of DOD and VA payments that are excluded from income.
    - If not, the client might obtain the same or similar documents through ebenefits.va.gov and mypay.dfas.mil

IV. Other Legislative Updates to the Bankruptcy Code

Besides the HAVEN Act, three other bankruptcy bills were signed into law by the President on August 23, 2019. The four bills that day were:

- H.R. 3311, the Small Business Reorganization Act
- H.R. 2336, the Family Farmer Relief Act
- H.R. 2938, the Honoring American Veterans in Extreme Need Act ("HAVEN Act")
- H.R. 3304, the National Guard and Reservist Debt Relief Extension Act. ("NGR – DREA")

Three of these bills are effective immediately, while the Small Business Reorganization Act (SBRA) is effective in 180 days, or on February 19, 2020.

A. The National Guard and Reservist Debt Relief Extension Act (Pub. L. No. 116-53, 133 Stat 1078; Formerly H.R. 3304)

The National Guard and Reservist Debt Relief Extension Act extends a specific income exemption from the means-test for qualified members of the reserves and

National Guard who receive orders to perform active duty service or homeland defense activities[57] for a minimum of 90 days. The exemption originally passed as part of the NGR-DREA of 2008 was set to expire at the end of 2019.

At times, members of the National Guard and Reserves receive higher pay while mobilized and serving on active duty compared to their income from their civilian jobs. Without the extension of this legislation, a Guardsman or Reservist who files for bankruptcy may have been evaluated based on their current income in addition to previous active duty pay. This would likely place the servicemember in a higher pay bracket than they can afford with their post-active duty income and simply did not reflect the reality of their financial status.

NGR DREA is effective immediately upon the date of signing and is an extension of current legislation for an additional four years, or to the end of 2023. This legislation should not significantly impact the practice of law for any attorney. Verifying eligibility for the exemption should proceed according to the methods currently in place.

B. The Small Business Reorganization Act (Pub. L. No. 116-54, 133 Stat 1079; Formerly H.R. 3311/S. 1091)

This bill was originally introduced by Iowa Senator Chuck Grassley on April 9, 2019 and Representatives Ben Cline, David Cicilline, Doug Collins, and Steve Cohen on June 18, 2019.[58] The Small Business Reorganization Act ("SBRA") is designed to reduce the cost to utilize the bankruptcy courts to reorganize and was the most complex of the four bills to pass. SBRA will become effective 180 days after signing, or on February 19, 2020.[59]

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[57] 32 U.S.C. § 901. A homeland defense activity requires that the action was "undertaken for the military protection of territory or domestic population of the United States." *Id.*
[58] *See President Signs Small Business Reorganization Act Into Law*, AMERICAN BANKRUPTCY INSTITUTE (Aug. 23, 2019) https://www.abi.org/newsroom/press-releases/president-signs-small-business-reorganization-act-into-law.
[59] Pub. Law No. 116-54, 133 Stat 1079 at Sec. 5.

The SBRA has two major components: (1) a new subchapter in Chapter 11, and (2) amendments that reform preference law. "The SBRA effectively makes it more difficult for creditors to contest small business Chapter 11 cases, but it also provides creditors in **all** bankruptcy cases several benefits through changes to the preferences laws."[60]

(1) New Small Business Chapter 11 Structure

SBRA adds a new "subchapter V" to Chapter 11 of Title 11 of the U.S. Code with the intention of providing less expensive and more expedited options for smaller businesses with lower debt holdings to effectively reorganize.[61] To be eligible for this new form of reorganization, a debtors' debt limit must not exceed $2,725,625.[62]

The Act's key provisions include:

- The parties will have a substantive status conference with the Court within the first 60 days from the filing of the petition to expedite economic resolution of the case
- The debtor has the exclusive right to file a Chapter 11 plan
- The Chapter 11 plan must be filed within 90 days of the petition for relief, except in certain circumstances
- A disclosure statement is not required
- An unsecured creditor's committee will not be formed
- The Chapter 11 plan can modify the rights of a creditor secured by a security interest in the debtor's principal residence if the loan secured by the residence was not used to acquire the residence but was used in connection with the debtor's business

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[60] Jeffrey Tarkenton, "*New Bankruptcy Act Makes Chapter 11 Plan Confirmation Easier for Small Business Debtors and Offers Benefits to Preference Defendants*," National Law Review (August 29, 2019) (emphasis added) found at: https://www.natlawreview.com/article/new-bankruptcy-act-makes-chapter-11-plan-confirmation-easier-small-business-debtors.

[61] *Id.*

[62] *Id. See President Signs Small Business Reorganization Act Into Law*, at https://www.abi.org/newsroom/press-releases/president-signs-small-business-reorganization-act-into-law

- The Court can confirm a debtor's plan without the support of any class of claims as long as the plan does not discriminate unfairly and is deemed to be fair and equitable with respect to each class of claims

- To be fair and equitable, the Chapter 11 plan must provide that all of the debtor's projected disposable income to be received during the length of the plan will be applied to make payments under the plan for a period of 3 to 5 years.

(2) Preference Action Changes

Amendments related to preference actions were also included in the SBRA. Under the prior law, trustees and debtors in possession had broad authority and procedural leniency to file lawsuits to recover preferential transfers which were made 90 days prior to the date the bankruptcy case was filed, or in the case of insiders, one year.[63] In addition, under the prior law, if the amount of the transfer was under the venue threshold of 28 U.S.C. section 1409(b), then the trustee or debtor in possession would have to file the lawsuit to recover the transfer in the federal district where the defendant resides, not in the district where the bankruptcy case is pending.[64]

SBRA now increases the claim venue threshold to $25,000.[65] Industry professionals believe that due to costs and logistics, increasing this floor to $25,000 might effectively abandon transfers that are less than $25,000.

Significantly, the SBRA also adds a new burden on the party filing the preference action that, before filing the filing party must exercise "reasonable due diligence" and must "…take into account a party's known or reasonably knowable affirmative defenses…"[66]

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[63] Jeffrey Tarkenton, "*New Bankruptcy Act Makes Chapter 11 Plan Confirmation Easier for Small Business Debtors and Offers Benefits to Preference Defendants*," National Law Review (August 29, 2019) (emphasis added) found at: https://www.natlawreview.com/article/new-bankruptcy-act-makes-chapter-11-plan-confirmation-easier-small-business-debtors.
[64] *Id.*; 28 U.S.C. § 1409(b) (prior to August 23, 2019).
[65] 28 U.S.C. § 1409(b).
[66] 11 U.S.C. § 547(b).

Practical questions about the SBRA's preference amendments are stirring in articles, blogs and listservs. We have seen the following and similar inquiries: *What does "reasonable due diligence mean?" Does "take into account" defenses shift the burden of affirmative defenses to the filing party? What amount of data must be reviewed and what level of analysis must be conducted to satisfy the "reasonably known affirmative defenses" requirement?*

One thing is certain, practitioners, the judiciary and professionals should be prepared for a developing body of case law, local rules, Trustee guidance and possibly new bankruptcy forms or software related to all of these legislative changes.

C. The Family Farmer Relief Act of 2019 (Pub. L. No. 116-51, 133 Stat 1075; Formerly H.R. 2336/S. 897)

The fourth bankruptcy bill is called The Family Farmer Relief Act of 2019. This bill increases the debt limit used to determine whether a family farmer is eligible to file for relief under Chapter 12 of the Bankruptcy Code. The debt limit is now increased from $3,237,000 to $10,000,000 as reflected in the new definition at 11 U.S.C. section 101(18).[67] This bill was introduced on March 27, 2019 by Iowa Senator Chuck Grassley and its companion bill was introduced on April 18, 2019 by Representative Antonio Delgado.[68] This law is effective immediately.

While general bankruptcy law provides that the date for consideration of eligibility is the date of filing the Chapter 12 relief, the new law does not address this issue precisely. The law also does not address any technical considerations for farmers considering a conversion from one chapter of bankruptcy to another. However, 11 U.S.C. § 1112(d) outlines criteria for conversion from Chapter 11 bankruptcy from Chapter 12 and would likely still be an applicable analysis.

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[67] *See President Signs Family Farmer Relief Act Into Law*, at https://www.abi.org/newsroom/press-releases/president-signs-family-farmer-relief-act-into-law

[68] *See President Signs Family Farmer Relief Act Into Law*, AMERICAN BANKRUPTCY INSTITUTE (Aug. 23, 2019) https://www.abi.org/newsroom/press-releases/president-signs-family-farmer-relief-act-into-law.

V. Other Recent Efforts Affecting Servicemembers Financial Status - Administrative Discharge of Student Loans for Disabled Veterans

On August 21, 2019, the President signed an executive action requiring the Department of Education ("DOE") and the VA to "develop" a more streamlined process to administratively discharge the federal student loan debt of disabled veterans with the designation of "totally and permanently disabled."[69] It is vital that those working in bankruptcy, consumer protection, and veteran's law understand the very technical definitions required to allow a veteran to qualify for such a discharge, and what the new executive action requires.

An administrative discharge of federally-held student loans for any person who "becomes permanently and totally disabled" has been available for decades.[70] The administrative discharge is available through the DOE and does not require the filing of a bankruptcy, or if the qualified person is already in bankruptcy, the filing of an adversary proceeding, to remove liability.[71]

A disability rating of 100% from the VA does not guarantee that the veteran qualifies as "permanently and totally disabled" as this is a special designation from the VA that comes with additional benefits.[72] Moreover, the DOE definition does not match the VA definition. The DOE definition of "totally and permanently disabled" instead requires either qualification due to an inability to work in "any substantial gainful activity" for a specified duration—either a continuous period of 60 months or

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[69] *See Memorandum for the Secretary of Education the Secretary of Veterans Affairs*, WHITE HOUSE (Aug. 21, 2019) https://www.whitehouse.gov/presidential-actions/presidential-memorandum-discharging-federal-student-loan-debt-totally-permanently-disabled-veterans/; codified at Discharging the Federal Student Loan Debt of Totally and Permanently Disabled Veterans, 84 Fed. Reg. 44,677, 2019 WL 3996836 (Aug. 21, 2019).
[70] 20 U.S.C. § 1087(a)(1).
[71] *Total and Permanent Disability (TPD) Discharge*, Federal Student Aid An Office of the U.S. Department of Education, https://www.disabilitydischarge.com/ (last visited Aug. 28, 2019).
[72] *See e.g.,* 5 U.S.C. § 2108(3)(F)-(G); *see also* 38 U.S.C. §§ 3500-3566.

likely to result in death—or under the separate qualification using a specific determination from the VA.[73]

This separate qualification requires the veterans to have a determination of "unemployable" from the VA[74] and specifies that veterans hold no obligation to "present additional documentation" to qualify for the administrative discharge once evidence of the unemployability due to the service-connected condition has been presented to the DOE.[75]

The VA has a number of regulations governing the individual unemployability of a veteran.[76] A determination of unemployability will allow the VA to pay a veteran rated at less than 100% for compensation purposes at the 100% rate.[77] Therefore, most veterans who hold a rating of 100% will not also hold an unemployability designation. Ultimately, there is a possibility that veterans holding a 100% disability rating from the VA for compensation purposes without the "permanent and total" or "unemployable" designation will not clearly qualify for the administrative discharge as the statutes and regulations are currently written.

The executive action seeks to reduce the application burden and perhaps make the administrative discharge automatic for qualified veterans. However, the executive action does not appear to address the confusion for veterans who are likely to fall outside of the current statutes and regulations.

The executive action also does not specifically address the concern that veterans may incur tax liability on the forgiven debt, however, at least one news agency reports that the President intends for this to be part of the improvements to

[73] 34 C.F.R. § 685.102.
[74] 34 C.F.R. § 685.102.
[75] 20 U.S.C. § 1087(a)(2).
[76] *See e.g.,* 38 C.F.R §§ 3.340; 3.341; 4.16; 4.17; 4.17a; 4.18.
[77] 38 C.F.R. § 4.16.

the discharge.[78] Currently, a TPD discharge of a student loan approved after January 1, 2018 until December 31, 2025 will not result in federal tax liability for the veteran.[79] At this time, TPD discharge does not prevent the possibility of the veteran incurring state tax liability.[80]

There is no timeline on the improvements to this administrative discharge system, however, practitioners should consider the possibility that clients are unaware that the option exists. The DOE may be receiving information from the VA currently, as it sends out letters to potentially eligible individuals, but there appears to be no current statutory obligation of notice to the veteran or student loan borrower regarding eligibility at this time.[81]

Currently, award letters for veterans receiving a new designation of permanent and total only highlight changes or continuations to ratings or the date to which eligibility for Dependents Education Assistance commenced. Student loans, their dischargeability, and what the VA can offer to assist are offered as an afterthought in the additional benefits section of one recent decision letter found in **Addendum C**. The language discussing permanent and total disability for the first time in the same veteran's decision letter was attached to the rating decision and is found in **Addendum D**.

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[78] Neil Vigdor. *Trump Orders Student Loan Forgiveness for Disabled Veterans. The directive came after 53 attorneys general criticized the federal Education Department for cumbersome eligibility rules for disabled veterans to eliminate their college loan debt.* THE NEW YORK TIMES (Aug. 21, 2019) https://www.nytimes.com/2019/08/21/us/trump-veterans-student-loans.html.

[79] 26 U.S.C. § 108(f)(5); *see also Total and Permanent Disability Discharge*, Federal Student Aid an Office of the U.S. Department of Education, https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/disability-discharge#is-discharged-amount-taxable (last visited Aug. 29, 2019).

[80] *Total and Permanent Disability Discharge*, *supra* note 74.

[81] *Frequently Asked Questions (FAQs) About Total and Permanent Disability Discharge*, Federal Student Aid An Office of the U.S. Department of Education, https://www.disabilitydischarge.com/faqs (last visited Aug. 28, 2019).

VI. Your Call to Duty.

There is more work to be done and the Task Force and other organizations need your help. We invite you to join the Task Force efforts and other organizations, like The Veterans Clinic at the University of Missouri or ABA's Military Pro Bono Center.[82]

[82] https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/Military_Pro_Bono/. Feel free to reach out to panelist Kristina Stanger to get involved or collaborate other efforts with Military Service Organizations.

Addendum A

(Benefits Covered by HAVEN Act – Excluded from CMI)

Addendum: Military Service-Related Benefits Protected by the HAVEN Act (to be codified at 11 U.S.C. § 101(10A)(B)(ii)(IV))
Below is a noncomprehensive list of benefits that can qualify for protection under the HAVEN Act. Other benefits paid by the Department of Defense and the Department of Veterans Affairs might also be protected under the HAVEN Act, and thus, all income received by a debtor from the DOD and VA should be evaluated to determine whether such income qualifies for protection.[1]

Benefit	Citation	Description[2]
Disability Retired Pay[3] **Permanent Disability Retirement** **Temporary Disability Retirement**	 10 U.S.C. §§ 1201, 1204 10 U.S.C. §§ 1202, 1205 (Chapter 61, Title 10)	Paid monthly to former or current servicemember upon permanent or temporary military retirement due to disability; pay computed under 10 U.S.C. § 1401 https://www.dfas.mil/retiredmilitary/disability/disability.html
Disability Severance Pay	10 U.S.C. § 1212; *see also* 10 U.S.C. §§ 1203, 1206	Paid as lump sum to servicemember upon military separation due to disability when circumstances do not meet criteria for disability-based military retirement https://www.dfas.mil/retiredmilitary/plan/separation-payments/disability-severance-pay.html
Combat-Related Special Compensation (CRSC)[4]	10 U.S.C. § 1413a; *see also* 38 U.S.C. §§ 5304-5305	Paid monthly to military retiree who has a combat-related disability; cannot be paid concurrently with CRDP https://www.dfas.mil/retiredmilitary/disability/crsc.html
Concurrent Retirement & Disability Payment (CRDP)[5]	10 U.S.C. § 1414; *see also* 38 U.S.C. §§ 5304-5305	Paid monthly to military retiree who is concurrently eligible to receive VA Disability Compensation and who has VA disability rating of at least 50%; cannot be paid concurrently with CRSC https://www.dfas.mil/retiredmilitary/disability/crdp.html
Survivor Benefit Plan Annuity (as to Disability Retirees under Chapter 61 of Title 10 only)	10 U.S.C. § 1448; *see also* 10 U.S.C. §§ 1201, 1202, 1204, 1205	Paid monthly to military retiree's eligible beneficiary, after retiree's death https://www.dfas.mil/retiredmilitary/provide/sbp.html

[1] In many cases, whether a benefit is protected will be clear. However, because the HAVEN Act does not list specific benefits paid under Titles 10, 37, and 38 that can be excluded from "current monthly income," some cases will require a practitioner to investigate the basis for the debtor's receipt of a particular benefit to determine whether the income can arguably be excluded. Additional information about benefits can be found at https://warriorcare.dodlive.mil/benefits/compensation-and-benefits/ and https://www.va.gov/.
[2] Benefit descriptions, including website links, are provided for basic informational purposes only. The descriptions should not be relied upon in evaluating potential eligibility for a listed benefit because not all eligibility criteria are stated.
[3] Military retirements based upon disability are governed by Chapter 61 of Title 10 (10 U.S.C. §§ 1201-1222). The HAVEN Act permits the exclusion of Chapter 61-based retired pay from "current monthly income" **only to the extent that such retired pay exceeds the amount of retired pay that the debtor would be entitled to receive if retired under another provision of Title 10**. Information about retired pay computation can be found in Chapter 71 of Title 10 (10 U.S.C. §§ 1401-1415), as well as on the Defense Finance and Accounting Service's website at https://www.dfas.mil/retiredmilitary/plan/estimate.html.
[4] CRSC has "Special Rules for Chapter 61 Disability Retirees," 10 U.S.C. § 1413a(b)(3). Given that the HAVEN Act has Chapter 61-related limiting language, *see supra* note 3, additional analysis could be required for a debtor who receives CRSC.
[5] CRDP has "Special Rules for Chapter 61 Disability Retirees," 10 U.S.C. § 1414(b). Given that the HAVEN Act has Chapter 61-related limiting language, *see supra* note 3, additional analysis could be required for a debtor who receives CRDP.

Special Survivor Indemnity Allowance	10 U.S.C. § 1450(c), (m)	Paid monthly to military retiree's surviving spouse or former spouse, after retiree's death, if Survivor Benefit Plan Annuity payments are offset by VA Dependency and Indemnity Compensation payments https://www.dfas.mil/retiredmilitary/survivors/Understanding-SBP-DIC-SSIA.html
Special Compensation for Assistance with Activities of Daily Living	37 U.S.C. § 439	Paid monthly to current or recent servicemember who requires help with activities of daily living due to catastrophic injury or illness incurred or aggravated in line of duty; cannot be paid concurrently with Aid and Attendance Allowance paid under 38 U.S.C. § 1114(r)(2) https://warriorcare.dodlive.mil/benefits/scaadl/
VA Disability Compensation Also known as "Service-Connected Disability Compensation" and "Veterans Compensation"	38 U.S.C. §§ 1104, 1110, 1114(a)-(j), 1115, 1131, 1134	Paid monthly to veteran who has a disability due to disease or injury incurred or aggravated while serving on active duty, or otherwise related to that service; payment amount depends upon disability rating (10% to 100%) and whether the veteran has qualifying dependents https://www.va.gov/disability/ https://www.benefits.va.gov/COMPENSATION/resources_comp01.asp
VA Special Monthly Compensation Can include Aid and Attendance Allowance or Housebound Allowance	38 U.S.C. §§ 1114(k)-(s), 1134	Paid monthly to veteran who receives VA Disability Compensation and who has special circumstances warranting additional compensation such as having specific service-connected anatomical losses or having need for daily in-home personal health care services https://www.benefits.va.gov/COMPENSATION/resources_comp02.asp
VA Dependency and Indemnity Compensation Can include Aid and Attendance Allowance or Housebound Allowance	38 U.S.C. §§ 1304, 1310-1318	Paid monthly to eligible survivors after servicemember's in-service or service-connected death or veteran's death due to service-connected disability (or equated as such) https://www.va.gov/burials-memorials/dependency-indemnity-compensation/
VA Veterans Pension[6] Also known as "Non-Service-Connected Disability Pension" Can include Aid and Attendance Allowance or Housebound Allowance	38 U.S.C. §§ 1502, 1513, 1521, 5312	Paid monthly as subsistence benefit to veteran who meets low income and net worth criteria, satisfies service requirements, and is either at least age 65 or "permanently and totally disabled" (generally due to non-service-connected disability); payment amount depends upon whether the veteran has qualifying dependents and in-home health care needs https://www.benefits.va.gov/pension/vetpen.asp
VA Vocational Rehabilitation & Employment Subsistence Allowance	38 U.S.C. § 3108	Paid monthly to veteran who has service-connected disability and who is participating in vocational rehabilitation program under Chapter 31 https://www.benefits.va.gov/vocrehab/subsistence_allowance_rates.asp

[6] As indicated in the description, this benefit can be paid based upon age without a qualifying disability. If so paid, the income would not be excludable from "current monthly income" under the HAVEN Act. If a veteran is eligible for the benefit based upon age and, separately, based upon a qualifying disability, it might be possible to rely upon the latter eligibility and to exclude the income from "current monthly income." *See* 38 U.S.C. § 1513(b).

Addendum B
(Intake Checklist)

Addendum B

Intake Form
to Screen for History of Military Service[1]

Name: _____

Have you ever served in the military? **Yes** **No**

If yes, please provide the information requested below.

If no but a loved one or household member has served in the military, please provide that person's service information below. Include that person's name and your connection to that person here:

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1. Branch of Service (select all that apply):

   Air Force Army Coast Guard Marine Corps

   Navy Other: _____

2. Active and/or Reserve Component and Dates of Service (please be as specific as possible):

   _____

   _____

3. Did the service include a mobilization or deployment? Yes No

   If yes,

   did the service relate to combat? Yes No

   did the service relate to homeland defense activities? Yes No

4. Did the service end due to medical reasons or death? Yes No
5. If you have ever received disability-related income from the Department of Defense, when did you last receive that income? _____
6. If you have ever received *any* income from the Department of Veterans Affairs, when did you last receive that income? _____
7. If you are the person who served, do you have *any* ongoing health issues, regardless of whether those health issues are service-related? Yes No
8. If you are not the person who served, do you have conditions that are or that might be disabling? Yes No

   If yes, are you the child of the person who served? Yes No
9. If you are not the person who served, is that person deceased? Yes No
10. Are you working with or would you like to be connected to someone who helps with claims for benefits or issues with military discharges? Yes No

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[1] Military service can lead to eligibility for financial resources, opportunities, and legal protections for those who have served and their families. To evaluate your case more completely, we seek to identify each person who has served in the military and then gather information about that military service.

Legal Office File No.: _____

USERRA Fact Sheet
(Uniformed Services Employment and Reemployment Rights Act)

U.S. DEPARTMENT OF LABOR

VETS USERRA Fact Sheet 3

Job Rights for Veterans and Reserve Component Members

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA 38 U.S.C. 4301-4335)

The Department of Labor, through the Veterans' Employment and Training Service (VETS), provides assistance to all persons having claims under USERRA.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) clarifies and strengthens the Veterans' Reemployment Rights (VRR) Statute.

USERRA protects civilian job rights and benefits for veterans and members of Reserve components. USERRA also makes major improvements in protecting service member rights and benefits by clarifying the law, improving enforcement mechanisms, and adding Federal Government employees to those employees already eligible to receive Department of Labor assistance in processing claims.

USERRA establishes the cumulative length of time that an individual may be absent from work for military duty and retain reemployment rights to five years (the previous law provided four years of active duty, plus an additional year if it was for the convenience of the Government). There are important exceptions to the five-year limit, including initial enlistments lasting more than five years, periodic National Guard and Reserve training duty, and involuntary active duty extensions and recalls, especially during a time of national emergency. USERRA clearly

establishes that reemployment protection does not depend on the timing, frequency, duration, or nature of an individual's service as long as the basic eligibility criteria are met.

USERRA provides protection for disabled veterans, requiring employers to make reasonable efforts to accommodate the disability. Service members convalescing from injuries received during service or training may have up to two years from the date of completion of service to return to their jobs or apply for reemployment.

USERRA provides that returning service-members are reemployed in the job that they would have attained had they not been absent for military service (the long-standing "escalator" principle), with the same seniority, status and pay, as well as other rights and benefits determined by seniority. USERRA also requires that reasonable efforts (such as training or retraining) be made to enable returning service members to refresh or upgrade their skills to help them qualify for reemployment. The law clearly provides for alternative reemployment positions if the service member cannot qualify for the "escalator" position. USERRA also provides that while an individual is performing military service, he or she is deemed to be on a furlough or leave of absence and is entitled to the non-seniority rights accorded other individuals on non-military leaves of absence.

Health and pension plan coverage for service members is provided for by USERRA. Individuals performing military duty of more than 30 days may elect to continue employer sponsored health care for up to 24 months; however, they may be required to pay *up to* 102 percent of the full premium. For military service of less than 31 days, health care coverage is provided as if the service member had remained employed. USERRA clarifies pension plan coverage by making explicit that all pension plans are protected.

The period an individual has to make application for reemployment or report back to work after military service is based on time spent on military duty. For service of less than 31 days, the service member must return at the beginning of the next regularly scheduled work period on the first full day after release from service, taking into account safe travel home plus an eight-hour rest period. For service of more than 30 days but less than 181 days, the service member must submit an

application for reemployment within 14 days of release from service. For service of more than 180 days, an application for reemployment must be submitted within 90 days of release from service.

USERRA also requires that service members provide advance written or verbal notice to their employers for all military duty unless giving notice is impossible, unreasonable, or precluded by military necessity. An employee should provide notice as far in advance as is reasonable under the circumstances. Additionally, service members are able (but are not required) to use accrued vacation or annual leave while performing military duty.

The Department of Labor, through the Veterans' Employment and Training Service (VETS) provides assistance to all persons having claims under USERRA, including Federal and Postal Service employees.

If resolution is unsuccessful following an investigation, the service member may have his or her claim referred to the Department of Justice for consideration of representation in the appropriate District Court, at no cost to the claimant. Federal and Postal Service employees may have their claims referred to the Office of Special Counsel for consideration of representation before the Merit Systems Protection Board (MSPB). If violations under USERRA are shown to be willful, the court may award liquidated damages. Individuals who pursue their own claims in court or before the MSPB may be awarded reasonable attorney and expert witness fees if they prevail.

Service member employees of intelligence agencies are provided similar assistance through the agency's Inspector General.

For more information about U.S. Department of Labor employment and training programs for veterans, contact the Veterans' Employment and Training Service office:

Regional Offices.

This is one of a series of fact sheets highlighting U.S. Department of Labor programs.

It is intended as a general description only and does not carry the force of legal opinion.

Connect With DOL

Resource Links

ABA Military Pro Bono Center – The Home Front Pro Bono Center brings together military and civilian attorneys to help military families
https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/Military_Pro_Bono/

ABI – Veterans Affairs Task Force
https://veterans.abi.org/

Faculty

Hon. Mary Grace Diehl is a retired U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, appointed in February 2004 and retired in 2018. She is currently serving on recall status. Prior to taking the bench, Judge Diehl was a partner in the litigation section of Troutman Sanders LLP and chaired its Bankruptcy Practice Group. During her years in private practice, she was consistently named in *The Best Lawyers in America* and *Chambers US: America's Leading Business Lawyers*. Judge Diehl is a past president of the National Conference of Bankruptcy Judges, and serves on the Boards of Directors of ABI, the Turnaround Management Association and IWIRC. She is also a Fellow of the American College of Bankruptcy and formerly served as vice president of its board of directors; she has also served on the boards of ABI, the Turnaround Management Association and the International Women In Restructuring Confederation (IWIRC). Judge Diehl received the Woman of the Year in Restructuring Award in 2008 from IWIRC (International Women in Restructuring Confederation), the David W. Pollard award for professionalism from the Atlanta Bar in 2013 and the Atlanta Bar Woman of Achievement Award in 2017, and she is a regular speaker at CLE programs. She served as a trustee of Canisius College from 2008-14 and received the outstanding alumni contributor award from Canisius in 2013. She has been an adjunct professor of law at Emory Law School and is a frequent speaker at national, regional and local educational programs. Judge Diehl received her B.A. *summa cum laude* from Canisius College in Buffalo, N.Y., and her J.D. *cum laude* from Harvard Law School.

Kristina M. Stanger is an attorney and shareholder with Nyemaster Goode, P.C. in Des Moines, Iowa, the state's largest firm, and focuses her practice on creditors' rights and bankruptcy. Her experience spans such industries as retail, grocery, agriculture, health care, construction, transportation and manufacturing, and her practice areas include construction and real estate litigation, creditor rights and bankruptcy litigation, banks and financial institution litigation, and business and commercial litigation. She appears in both federal and state courts for secured and unsecured creditors in a variety of contexts. In addition to her legal practice, Ms. Stanger is a combat-experienced Lieutenant Colonel in the Iowa Army National Guard and a 2017 AMEDD Iron Major. She served more than 20 years as an enlisted soldier, commander and planner for state, national and international operations, and now serves as one of the state of Iowa's highest-ranking females and is the Battalion Commander for the 109th Medical Battalion for the Iowa Army National Guard. Ms. Stanger has held a number of committee positions with the Iowa State Bar Association, is an author and speaker on bankruptcy and commercial law topics, and provides *pro bono* services on behalf of veterans and their families. She also was a member of the 2016 Next Generation Class for the National Conference of Bankruptcy Judges (NCBJ), is a 2018 ABI "40 Under 40" honoree, and chairs IWIRC's Midwest Network. Ms. Stanger is admitted to practice in all state, federal and bankruptcy courts in Iowa and the Eighth Circuit Court of Appeals. Following law school, she interned for Hon. Ronald E. Longstaff of the U.S. District Court for the Southern District of Iowa and clerked for the Iowa Academy of Trial Lawyers U.S. Army Command and General Staff College in 2014. Ms. Stanger graduated with distinguished honors from the 185th Military Regional Training Institute's Officer Candidate School in 2000, received her B.A. *magna cum laude* from Central College the same year, and received her J.D. with high honors from Drake University in 2006, where she was a member of the Order of the Coif, worked on the *Drake Law Review* and was active in its moot court program.

Hon. Elizabeth S. Stong has served as a U.S. Bankruptcy Judge for the Eastern District of New York in Brooklyn since 2003. Prior to her appointment the bench, she was a litigation partner and associate at Willkie Farr & Gallagher in New York, an associate at Cravath, Swaine & Moore, and law clerk to Hon. A. David Mazzone, U.S. District Judge in the District of Massachusetts. Judge Stong is a member of the Council on Foreign Relations, the Council of the American Law Institute and the board of the ABA Center for Innovation, and she holds leadership roles in the International Insolvency Institute, Practising Law Institute, P.R.I.M.E. Finance, American Bar Foundation and the ABA's Business Law Section and Judicial Division. Judge Stong's past positions include president of the Harvard Law School Association, chair of the NCBJ International Judicial Relations Committee, and chair of the New York City Bar's ADR Committee. She also served on the ABA's Standing Committee on *Pro Bono* and Public Service, Standing Committee on the American Judicial System, Standing Committee on Continuing Legal Education, Commission on Women in the Profession, and Commission on Homelessness and Poverty. Judge Stong has trained judges in Central Europe, North, Central and West Africa, the Middle East and the Arabian Peninsula with the U.S. Commerce Department, the World Bank and INSOL. She also has consulted with the Supreme Court of China and People's High Courts in Beijing and Guangzhou, and led judicial workshops in Cambodia, Argentina, Brazil and Chile. She received the ABA Glass Cutter Award, the NYIC Hon. Cecelia Goetz Award, the Brooklyn Bar Association's Freda Nisnewitz Award for Pro Bono Service, and the MFY Legal Services Scales of Justice Award. Judge Stong is an adjunct professor at Brooklyn Law School and St. John's University School of Law. She received her A.B. *magna cum laude* from Harvard University and her J.D. from Harvard Law School.

Jessica Hopton Youngberg is a law clerk at the U.S. Bankruptcy Court for the District of Massachusetts in Boston. Before joining the court in late 2019, she worked as a senior staff attorney at Veterans Legal Services, a nonprofit legal aid organization in Boston, where she helped low-income veterans with a broad range of civil legal matters, including those related to public and veterans benefits, consumer debt and bankruptcy, family law, housing and military records. Ms. Youngberg has a long history of public service, including working for the American Red Cross's Service to the Armed Forces Division while living in Korea during her husband's military service before she attended law school. While in law school, she interned with Veterans Legal Services, the Massachusetts Attorney General's Office, a federal judge in the Western District of Oklahoma and a bankruptcy judge in the District of Massachusetts. She also served as a teaching assistant, research assistant and lead articles editor for the *Journal of Health and Biomedical Law*. Ms. Youngberg co-chaired the Boston Bar Association's Active Duty Military & Veterans Forum for three years and has served as a co-chair of its Financial Literacy Committee, which has overseen a financial literacy program for high school students for the last two years. She also is a member of the *Pro Bono* Committee for the U.S. Bankruptcy Court for the District of Massachusetts and a member of ABI's Servicemembers and Veterans Affairs Task Force. Ms. Youngberg received her B.S. in 2005 from Middle Tennessee State University and her J.D. *summa cum laude* from Suffolk University Law School in 2013, where she was lead articles editor of the *Journal of Health & Biomedical Law*.