By Katherine Everett Iskin

The HAVEN Act Goes to Kindergarten

Lessons and Opportunities Five Years In

On Aug. 23, 2019, Public Law No. 116-52, 133 Stat. 1076, titled "Honoring American Veterans in Extreme Need" (HAVEN) Act, became law. Its legislative history reflects Congress's desire to "make sure [that] our bankruptcy system is serving our veterans," who "deserve an opportunity to get back on their feet with dignity."[1] The HAVEN Act has five years' worth of legal utilization and litigation behind it. Now that it is old enough to go to kindergarten, what lessons has it taught us, and what is there yet to learn?[2]

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Play Fair: The History Behind the HAVEN Act

The need for the HAVEN Act sprang from the means-testing implementation created by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Specifically, BAPCPA crafted the concept of current monthly income (CMI).[3] For good or ill,[4] CMI is used to determine whether a consumer debtor has sufficiently high income relative to other similarly situated households to support payments to unsecured creditors in chapter 13.

Consumer debtors in chapter 7 must use CMI to determine whether remaining in chapter 7 would be abusive, in which case the U.S. Trustee or Bankruptcy Administrator would move to dismiss or convert the case to chapter 13.[5] In chapter 13, CMI is used to determine both the plan length and minimum unsecured creditor distribution.[6]

CMI's technical definition is somewhat convoluted.[7] Before the HAVEN Act's enactment, all benefits paid to veterans for military disability, as well as death benefits for surviving dependents, were included as income for CMI purposes, the same as wages or any other income. Given that Social Security disability was excluded from CMI, this was confusing at best.

The HAVEN Act sought to rectify this inequitable application of bankruptcy law to government-paid disability benefits, particularly for a historically vulnerable population. Substantively, the HAVEN Act excludes 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" from CMI calculations.[8]

In plain language (for a bankruptcy practitioner), the U.S. Department of Veterans Affairs (VA) disability compensation could be treated like Social Security disability income and excluded from disposable-income calculations in full. This was a boon for disabled veterans, who before found themselves paying unsecured creditors in chapter 13 due to "excess" disposable income. Thanks to the HAVEN Act, they could instead utilize the faster discharge of chapter 7. The HAVEN Act was passed with broad support from the public and bankruptcy professionals alike.[9]

Don't Take Things that Aren't Yours: A Survey of Case Law

Between 2005 (when BAPCPA became law) and 2019 (when the HAVEN Act passed), at least 11 cases were published specifically analyzing whether VA disability was income for purposes of CMI inclusion. The cases skew to chapter 13 and almost universally hold that such benefits must be included in disposable-income calculations due to the lack of explicit language removing it from § 101(10A), despite efforts to recategorize it by creative debtors' counsel.[10]

The first published decision after the HAVEN Act's enactment came less than three months later.[11] The most recent published case with a direct citation to the HAVEN Act is from February 2023.[12] There appear to be only 10 published opinions that specifically cite the HAVEN Act.[13] Of these opinions, eight involve disposable income in chapter 13 cases, one relates to the presumption of abuse in

1 165 Cong. Rec. H7215-01 (July 23, 2019) (statement of Rep. Lucy McBath).
2 Formatting inspired by Robert Fulghum's 1988 classic, *All I Really Need to Know I Learned in Kindergarten: Uncommon Thoughts on Common Things.*
3 11 U.S.C. § 101(10A).
4 *See, e.g.*, Mark P. Telloyan, Maria Bandwen & Jake Landreth, "The Means Test Should Not Be Abolished in Chapter 7 Cases," XL *ABI Journal* 11, 18, 54-55, November 2021, *available at* abi.org/abi-journal/the-means-test-should-not-be-abolished-in-chapter-7-cases.
5 11 U.S.C. § 707(b).
6 11 U.S.C. § 1325(b).
7 Despite being labeled "current monthly income," the definition includes funds that are not currently received, are not paid monthly, and are not "income" by any other definition.
8 11 U.S.C. § 101(10A)(B)(ii)(IV).
9 "This bill is supported by the Veterans of Foreign Affairs, the American Legion, and the Disabled American Veterans, the National Conference of Bankruptcy Judges, and the American College of Bankruptcy among others." 165 Cong. Rec. E980-01 (July 24, 2019) (statement of Hon. Sheila Jackson Lee).
10 *See, e.g., In re Power*, 2008 Bankr. LEXIS 5163, *6 (Bankr. D. Nev. May 19, 2008) ("Debtors do argue, however, that the VA Benefits received by Mr. [George] Power are excluded from current monthly income under Section 101(10A)(B) because of his status as a victim of a war crime.").
11 *See In re Price*, 609 B.R. 475 (Bankr. N.D. Tex. 2019).
12 *See In re Williamson*, 2023 Bankr. LEXIS 451 (Bankr. N.D. Ohio Feb. 21, 2023).
13 Search results according to Lexis+ (last visited Nov. 15, 2024).

chapter 7,[14] and one mentions the HAVEN Act in passing in a discussion about retroactivity.[15] An expanded search reveals only two additional cases — one each in chapter 7[16] and 13[17] — about whether VA disability can even be considered property of the estate.[18]

Statistically, bankruptcy courts doing the work in this area of jurisprudence and are not being appealed. Of the 12 published cases, only one is appellate level. The published cases are also not geographically dispersed. The southeastern seaboard is represented from Florida to Virginia, with two cases from North Carolina. There are a handful of cases from the Great Lakes region and one from Texas. There do not appear to be any published cases from further West.

Substantively, the pendulum has moved to favor the protection of VA disability benefits over inclusion in disposable income. The majority of the published cases that directly apply the HAVEN Act to military disability benefits as disposable income exclude it entirely, with the holdings universally excluding it in unconfirmed chapter 13 cases. As one court stated, "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...."[19] It is not surprising that courts ruled strongly in support of a law that was supported by the National Conference of Bankruptcy Judges, particularly when "application of the HAVEN Act to all cases ... is consistent with the policy of the Judicial Conference."[20]

Put Things Back Where You Found Them: Overarching Themes

The most curious post-enactment HAVEN Act takeaway is the dearth of case law. Given the broad support for the HAVEN Act, one might expect to find more case law on point. The case law available reflects that the HAVEN Act is working as intended and being applied liberally to protect veterans' disability benefits.

One surprising theme running through the HAVEN Act jurisprudence is the retroactive application of recently enacted laws.[21] It is not unexpected that the HAVEN Act was utilized to attempt to back out military disability benefits in cases filed prior to its August 2019 enactment; it was a popular change that was widely supported in the bankruptcy community, which drew practitioners' notice. The extent that its application in this fashion was to be used as a guide for other tests of impermissible retroactivity, including the change in U.S. Trustee fees,[22] was not apparent.

Another extrapolation from the published cases is that consumer debtors with potential disposable-income issues may have reason to prefer chapter 7 over chapter 13, aside from the speed of discharge and lack of plan payments. Of the published cases about VA disability income's availability for disposable income both before and after the enactment of the HAVEN Act, the wide majority involve chapter 13 trustees attempting to capture the disability benefit as disposable income. This could be due to chapter-specific issues, such as post-confirmation modification, not found in other chapters, but the chapter disparity is noteworthy.

> **Removing military retirement from CMI calculations would at least remove an insolvent veteran's disincentive to participate in the workforce for strictly income-based reasons.**

Clean Up Your Own Mess: Opportunities for Change

The language of the Bankruptcy Code explicitly excludes "retired pay" above the disability award from the HAVEN Act's CMI carve-out for uniformed service compensation. Put differently, U.S. military retirement pay is treated as income available for unsecured creditors. This has the practical effect of bifurcating partially disabled retired veterans' payments for their military service into blended CMI-exempt and nonexempt portions. This has challenges in application[23] and client relations.[24] At least one court has specifically held that "military pension is not excluded from the calculation of his" CMI,[25] and a second draws attention to this "nuanced statutory limitation."[26]

The legislative history previously described reflects a desire to treat compensation for uniformed service disability like Social Security. The changes made by the HAVEN Act go so far as to mimic the exempt treatment of Social Security death benefits for surviving dependents. However, it is unclear why military retirement pay is not afforded the same treatment.

While military disability compensation is treated like Social Security disability rather than similar compensation from private insurance, military retirement is treated like a private-sector pension, subject to CMI calculations. This is incongruous in practice and at odds with the public policy of ensuring that "our bankruptcy system is serving our veterans."[27]

While protecting our most vulnerable veterans' disability compensation from administration in bankruptcy was a critical and overdue change, the omission of military retirement pay from the CMI calculation exemption seems like

14 *See In re Roman*, 2021 Bankr. LEXIS 1823 (Bankr. M.D. Fla. July 7, 2021).
15 *See In re Clayton Gen. Inc.*, 2020 Bankr. LEXIS 842 (Bankr. N.D. Ga. March 30, 2020).
16 *WiscTex LLC v. Galesky (In re Galesky)*, 648 B.R. 643 (Bankr. E.D. Wis. 2022).
17 *In re Johnson*, 655 B.R. 83 (Bankr. D.S.C. 2023).
18 *WiscTex LLC v. Galesky (In re Galesky)*, 648 B.R. 643, 698 (Bankr. E.D. Wis. 2022) (VA disability compensation is "broadly exempt under applicable nonbankruptcy law from the claims of most creditors in most (if not all) legal and equitable processes, including bankruptcy"). *See id.* at 698.
19 *In re Gresham*, 616 B.R. 505, 510 (Bankr. E.D. Mich. 2020).
20 *Id.*
21 No more cases are likely to be published on this point, as the HAVEN Act was enacted in 2019, and the 60-month maximum plan term of chapter 13 means that cases in which it is relevant would have completed in 2024.
22 *See, e.g., In re Clayton Gen. Inc.*, 2020 Bankr. LEXIS 842 (Bankr. N.D. Ga. March 30, 2020).
23 Form B-106I, commonly referred to as Schedule I, does not provide a clear option to demarcate the exempt and nonexempt portions of retired military compensation for disposable-income purposes.
24 To paraphrase one of my own clients, "Why am I being punished for not getting blown up?"
25 *In re Roman*, *supra* at *5.
26 *See In re Williamson*, 2023 Bankr. LEXIS 451, n.31 (Bankr. N.D. Ohio Feb. 21, 2023).
27 *See supra* n.1.

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an error. When the competing interests of paying unsecured creditors comes against that of protecting retirement-age veterans' compensation for uniformed service, there should be no question that veterans' interests outweigh fractional payments to unsecured claimants. This is even more compelling given that agents[28] of the same U.S. government that the veteran served are typically the party enforcing the disposable-income requirements in §§ 707 and 1325 of the Bankruptcy Code. While disposable income availability benefits creditors and is a function of the Code's black-letter application, it has an overtone of governmental ingratitude.

Not only is the diversion of military retirement pay into CMI calculations contrary to the policy goals behind the HAVEN Act, it also disincentivizes insolvent able-bodied workers from generating employment-based income. If a veteran on the cusp of retirement is required to pay unsecured creditors for five years in a chapter 13 case if he/she is employed and has the ability to not pay unsecured creditors and secure a chapter 7 discharge quickly while not working, there is little reason to continue to work.

Labor-force participation is shrinking, and worker shortages are becoming more problematic.[29] Removing military retirement from CMI calculations would at least remove an insolvent veteran's disincentive to participate in the workforce for strictly income-based reasons. Removing the limiting language in § 101(10A)(B) that clearly excludes "retired pay" above the disability award from the HAVEN Act's CMI carve-out for uniformed-service compensation is an intuitive and appropriate extension of the HAVEN Act for public policy reasons, and for uniformity and clarity in application of the Code. abi

28 The U.S. Trustee, Bankruptcy Administrator or case trustee, depending on the situation.

29 *See* Stephanie Melhorn, "Understanding America's Labor Shortage," U.S. Chamber of Commerce Blog, *available at* uschamber.com/workforce/understanding-americas-labor-shortage (last visited Nov. 19, 2024).