HAVEN Act’s Amendment to CMI
Broadly Protecting Military Service-Related Disability
and Death Benefits in Bankruptcy

On Aug. 23, 2019, the Honoring American Veterans in Extreme Need Act of 2019 (HAVEN Act) was signed into law by President Donald Trump and immediately became effective to help servicemembers and veterans, among others. The HAVEN Act amended § 101(10A) of the Bankruptcy Code — defining “current monthly income” (CMI) — by entirely striking and replacing subparagraph (B). The new subparagraph (B) contains the prior’s text, expressing what CMI “includes” and “excludes,” and divides that text into clauses and subclauses. Most importantly, new subparagraph (B) adds a fourth category of income that is now excluded from CMI: 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 paid 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 of the U.S. Code covers “Armed Forces,” while chapter 61 addresses retirement and separation due to disability. Related, title 37 of the U.S. Code covers “Pay and Allowances of the Uniformed Services,” and title 38 covers “Veterans Benefits.” Because no specific benefits or beneficiaries, for example, are named in the new CMI exclusion, a substantial opportunity exists to protect a broad range of payments made under titles 10, 37 and 38 to a variety of recipients, including servicemembers, veterans and certain family members.

Determining Whether the New CMI Exclusion Applies

Payments under titles 10 and 37 are paid primarily by the Department of Defense (DOD) through its Defense Finance and Accounting Service (DFAS), and payments under title 38 are paid by the Department of Veterans Affairs (VA). Payments from either department should be reviewed for potential excludability from CMI.

Multiple payment types from the DOD and VA have similar names but are not paid under similar circumstances. Thus, it can be essential to determine the precise payment type at issue. Award letters, benefit-summary letters, benefit-payment histories, and leave and earnings statements are all potential sources of concrete information. Such documents are often readily available to servicemembers, veterans and other beneficiaries through federal websites.

Although these documents typically state the payment type, they might lack information about the statutory authority for the payment. To aid practitioners, ABI’s Task Force on Veterans and Servicemembers Affairs has prepared a chart listing relevant payment types, along with citations, descriptions and links to additional information.

In many cases, whether payments can be excluded from CMI will be clear. One example of a clearly apparent excluded payment is VA Disability Compensation paid monthly under title 38 to veterans who have a service-connected disability. The same is true of VA Special Monthly Compensation, which is paid monthly under title 38 to those receiving VA Disability Compensation who also have

---

1 In part, this article reproduces text from a document that the author prepared for ABI’s Task Force on Veterans and Servicemembers Affairs. See infra n.11 and accompanying text.
4 See Pub. L. No. 116-52; to be codified at 11 U.S.C. § 101(10A)(B)(iv)(W)). This addition implicates the chapter 7 “means test” and chapter 13 “disposable income.” ABI’s Task Force on Veterans and Servicemembers Affairs previously identified a general need for such an amendment, as detailed in the works available at veterans.abi.org.
5 The term “army forces” includes the Army, Navy, Air Force, Marine Corps and Coast Guard. 10 U.S.C. § 101(a)(4); 37 U.S.C. § 101(a), 504(k), 926, 928 (8th Cir. 1993). The “uniformed service” include the armed forces, as well as the commission services of the Public Health Service (PHS) and the National Oceanic and Atmospheric Administration (NOAA). 10 U.S.C. § 101(a)(5); 37 U.S.C. § 101(3).
6 Although the “V” in “HAVEN” refers to “Veterans,” the statutory language does not limit the new CMI exclusion to individuals with a specific status such as “veteran.”
7 Not all payments under titles 10 and 37 are from DOD; these payments are also paid by other departments such as the Coast Guard, PHS and NOAA. See supra n.5; see also 10 U.S.C. § 101(a)(9); 37 U.S.C. § 101(b). Thus, payments from the other departments should be reviewed as well.
8 Recipients may not know or understand their source(s) of income. Thus, documentation confirming and substantiating payment types will often be key and should be requested prior to petition filing.
9 Deposit descriptions or bank statements might also provide information about payment type. These websites include eBenefits.va.gov and mypay.dfas.mil, among others. In addition, if needed, personnel and medical records can often be accessed on the eBenefits website and otherwise can be requested through standardized forms.
10 The chart, available at veterans.abi.org, is not comprehensive but offers information about commonly encountered payment types that could be excludable from CMI. Benefit descriptions there and ones discussed in this article are for basic informational purposes only; not all eligibility criteria are stated.
11 See 38 U.S.C. §§ 1104, 1110, 1114(a), 1115, 1131, 1134. Also known as “Service-Connected Disability Compensation” and “Veterans Compensation.” It is paid to more than 4.7 million veterans who have a disability due to disease or injury incurred or aggravated while serving on active duty, or otherwise related to that service. Payment amounts are based on factors such as disability rating (10 to 100 percent) and whether the veteran has certain “dependents.” See, e.g., 38 U.S.C. §§ 1114, 1115, 1134, 1135.
special circumstances warranting additional compensation. Similarly, 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) — also easily meets the conditions to be excluded from CMI.

Interpreting the New CMI Exclusion

Although many cases will be clear, payments from DOD and VA could also fall into gray areas that require further analysis and potential advocacy before being excluded from CMI. Examples include disability retired pay, hostile fire pay/imminent danger pay (HFP/IDP) and VA Veterans Pension.

The new CMI definition limits the exclusion of “retired pay paid under chapter 61 of title 10” — i.e., disability retired pay, which is paid monthly upon a servicemember’s temporary or permanent military retirement due to a disability. Specifically, the limiting language states that any retired pay excluded ... 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.16

This language appears to be intended to prevent the exclusion of retired pay that could be received regardless of disability. After serving on active duty for 20 years, a servicemember is generally eligible to retire based on having served the typical minimum time necessary to qualify for retirement. This servicemember might have planned to continue serving, but due to a disabling condition, the servicemember is being retired under chapter 61. As described below, such a retirement can nevertheless lead to the servicemember receiving a disability retired pay amount that is based on time in service, and that is the same amount as the servicemember would have received without the disabling condition.

Disability retired pay is initially computed under two formulas. One formula takes the length of service into account, essentially computing regular (nondisability) retired pay, regardless of whether the servicemember’s time in service would qualify for that retirement. The other formula generally takes severity of disability into account. The results are compared, and the most favorable amount is paid. Thus, a disability retiree might receive the amount of retired pay to which he/she would otherwise be entitled if retired under the regular retirement provisions of title 10 — provisions other than chapter 61.

If a veteran is eligible to receive the benefit based on age and, separately, based on disability, it might be possible to rely on the latter to exclude the income from CMI.

Multiple interpretations of the CMI exclusion’s limiting language are possible. But it stands to reason a disability retiree seeking relief under the Bankruptcy Code can at least exclude disability retired pay to the extent that it exceeds the amount of retired pay that would have been received based on time in service. For example, if the disability retiree receives $1,500 but would have been entitled to receive $1,000 based on time in service, the disability retiree should be able to exclude $500 from CMI.

Because, apart from disability retirement, time-in-service requirements must be met in order to retire, it is possible that a much broader exclusion could apply to disability retirees who were retired before serving long enough to qualify for retirement based on time in service.20 Such a retiree would not “otherwise be entitled” to receive retired pay under title 10 because the retiree could not have “retired under any provision of title 10 other than chapter 61.” Thus, arguably, that retiree’s entire disability retired pay amount could be excludable from CMI.

Turning to an example under title 37, HFP/IDP could require inquiry into the basis for the payment to determine whether it is excludable from CMI. HFP/IDP is paid to servicemembers based on the actual or potential for exposure to hostile-fire and imminent-danger situations. Under those conditions alone, HFP/IDP does not qualify to be excluded from CMI because it is not being paid “in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services.”21

However, HFP/IDP can also be paid, up to the monthly maximum amount, to a servicemember who is “killed, injured, or wounded by ... hostile action” for the day of such occurrence. If the servicemember is hospitalized for such an injury or wound, or for a combat-related injury, wound

---

13 See 38 U.S.C. §§ 1114(k)-(s), 1134. Special circumstances include having specific service-connected anatomical losses or needing daily-in-home personal health care services.
14 See 38 U.S.C. §§ 1304, 1310-1318; Pub. L. No. 116-52 (“[M]onthly compensation, ... paid under title ... in connection with a disability ... or death of a member of the uniformed services.”).
15 See 10 U.S.C. §§ 1201, 1202, 1204, 1205, 1401. Roughly, such retirement follows a complex, multi-step and often lengthy process to evaluate the servicemember’s ability to continue serving. When the criteria for disability-based military retirement have not been met but separation from the military due to disability is still warranted, the servicemember might receive disability severance pay (a one-time, lump-sum payment). See 10 U.S.C. §§ 1203, 1206, 1212. This payment type differs from disability retired pay and is not implicated in the limiting language of the new CMI exclusion.
17 Twenty years is typically required under the military’s “cliff-vesting” retirement system. Occasionally, retirement is permitted “early” after 15 years and involves complex computations that appear designed to yield monthly retired pay that is less than or equal to the 20-year retirement. Retired pay computations are available on Dfas’s website. See “Types of Retirement,” Def. Fin. & Accounting Serv., available at dfas.mil/retirement/plan/retirement-types.html (last visited Oct. 9, 2019); “Estimate Your Retirement Pay,” Def. Fin. & Accounting Serv., available at dfas.mil/retirement/plan/estimate.html (last visited Oct. 9, 2019).
19 See 10 U.S.C. § 1401 (stating entitlement to pay under most favorable formula but also permitting election); DFAS sends a letter with the two amounts shown.
21 In general, the new CMI exclusion’s limiting language warrants further investigation and analysis beyond the scope of this article. As a practice tip, though, it is important first to confirm the most recent sources of a retiree’s payments — because retired pay (taxable) might have been waived partially or entirely after being awarded to receive VA Disability Compensation (nontaxable and clearly excludable from CMI), although it can also be possible to receive both payments concurrently, see 10 U.S.C. § 1414, 38 U.S.C. §§ 5304-5305.
22 HFP/IDP, often referred to informally as “combat pay,” should not be confused with other similarly named payments such as Combat-Related Special Compensation, which can be paid monthly to military retirees who have a combat-related disability. See 10 U.S.C. § 1413a.
25 See 37 U.S.C. § 310(a)(2)(C); supra n.23.

continued on page 71
or illness, the servicemember can be paid HFP/IDP for up to three additional months while hospitalized.26 When paid under such conditions, HFP/IDP could qualify to be excluded from CMI under amended § 101(10A)(B).

Further, if a servicemember is hospitalized due to a combat- or hostile fire-related wound, injury or illness that is incurred in the line of duty, “all pay and allowances” that were being paid when the wound, injury or illness occurred can continue to be paid during the hospitalization and subsequent rehabilitation27 and could potentially qualify to be excluded from CMI.

An example from title 38 also highlights the need in certain cases to determine the underlying basis for payments. The VA Veterans Pension is paid monthly as a subsistence benefit to veterans who meet low-income and net-worth criteria, among other requirements, and are either at least age 65 or “permanently and totally disabled.”28 If the benefit is paid based on age, the payment generally does not qualify to be excluded from CMI. However, if the benefit is paid based on disability, it should qualify to be excluded from CMI. If a veteran is eligible to receive the benefit based on age and, separately, based on disability, it might be possible to rely on the latter to exclude the income from CMI.29

Ultimately, as noted, excludability in many cases will be apparent. The gray-area examples discussed herein are intended to highlight not only the need to investigate payment types but also the opportunity to advocate for the broadest possible interpretation of the new CMI exclusion to help servicemembers and veterans, among others, to protect benefits that were hard-won in connection with service to and sacrifices for our country, consistent with the purpose behind the HAVEN Act.  

26 37 U.S.C. § 310(c).
27 See 37 U.S.C. § 372(b) (permitting, but not requiring, ongoing pay to servicemember during and after hospitalization connected with limited circumstances described).
28 See 38 U.S.C. §§ 1502(a) (defining “permanently and totally disabled”), 1513, 1521-23, 5312. The VA Veterans Pension is not a “pension” in the traditional sense; rather, it is a means-tested benefit. It is also known as a “Non-Service-Connected Disability Pension” because disabilities need not be service-connected. The payment amount can vary depending on whether the veteran has qualifying dependents and in-home health care needs, among other factors.