

On Our Watch

BY ADAM D. HERRING AND WALTER W. THEUS

New Laws, New Duties

USTP's Implementation of the HAVEN Act and the SBRA

Editor's Note: ABI recently held a webinar that provided an overview of three new bankruptcy laws. ABI Executive Director **Samuel J. Gerdano** moderated the webinar, which featured **Robert J. Keach** (Bernstein Shur; Portland, Maine), **Kristina M. Stanger** (Nyemaster Goode, PC; Des Moines, Iowa), **Joseph A. Peiffer** (Ag & Business Legal Strategies; Cedar Rapids, Iowa) and **Donald L. Swanson** (Koley Jessen; Omaha, Neb.). Catch a replay at abi.org/newsroom/press-releases/educational-press-briefings (see p. 10 for excerpts).



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On Aug. 23, 2019, President Donald Trump signed into law four significant pieces of legislation affecting the bankruptcy system: the Small Business Reorganization Act (SBRA),¹ the Honoring American Veterans in Extreme Need (HAVEN) Act,² the Family Farmer Relief Act³ and the National Guard and Reservists Debt Relief Extension Act.⁴ The SBRA and HAVEN Act each represent substantial changes to bankruptcy law and practice. For example, revised bankruptcy forms will likely be promulgated related to both new laws.

The U.S. Trustee Program (USTP) will likewise adjust its exercise of its statutory oversight and enforcement responsibilities to faithfully implement both new statutes. Teams of experienced field and Executive Office personnel have also been assembled to review and recommend changes to the USTP's practices and to identify legal issues involved in implementing the new laws.⁵ This article provides an overview of the changes practitioners should look out for, particularly the important changes relative to the appointment of a "case-by-case" trustee in new subchapter V cases.

HAVEN Act

The HAVEN Act excludes certain disability and death-related benefits payable to servicemembers, veterans and their survivors from the Bankruptcy Code's⁶ definition of "current

monthly income" (CMI).⁷ This treatment mirrors the Code's exclusion from CMI of benefits under the Social Security Act. The excluded benefits are administered by the Department of Defense or Department of Veterans Affairs.⁸ Retired pay is excluded from CMI, but only if it is pay the debtor receives because of disability. The HAVEN Act's amendments apply to means-testing or disposable-income calculations in individual cases under chapters 7, 11 and 13.⁹

The USTP reviews all individual chapter 7 cases for abuse,¹⁰ including the presumption of abuse that might arise under the means test and abuse that might arise based on the debtor's bad faith or under the totality of the circumstances.¹¹ By modifying CMI's definition, the HAVEN Act directly changes the means-testing analysis under § 707(b)(2) of the Bankruptcy Code, but it does not explicitly affect dismissal under the bad-faith or totality-of-the-circumstances provisions of § 707(b)(3).

The USTP will limit its requests for documents related to income excluded from CMI under the HAVEN Act to avoid unduly burdening debtors. The USTP does not routinely request from debtors documents not otherwise required by the Bankruptcy Code or Rules without a specific need for additional information. The USTP will advise chapter 7 and 13 trustees, as a best practice, to similarly limit their HAVEN Act-related document requests to what is necessary for proper administration of the case.

As issues related to the HAVEN Act amendments arise, the USTP will work to ensure that its approach is faithful to the language of the statute and, if ambiguities arise, will generally resolve them in favor of the recipients of benefits covered by the Act.

1 Pub. L. No. 116-54 (2019).
2 Pub. L. No. 116-52 (2019).
3 Pub. L. No. 116-51 (2019) (amending 11 U.S.C. § 101(18) to increase the debt limit for chapter 12 relief to \$10 million, subject to adjustment under 11 U.S.C. § 104).
4 Pub. L. No. 116-54 (2019) (extending, for an additional four years, existing exemption from means test for qualifying reservist and National Guard debtors who are called to active duty or to perform a homeland defense activity for not less than 90 days). See 11 U.S.C. § 707(b)(2)(D)(ii).
5 The USTP recognizes James L. Snyder, Acting U.S. Trustee for Region 12, and **Daniel J. Casamatta**, Acting U.S. Trustee for Region 13, for their diligent work in coordinating these efforts.
6 11 U.S.C. §§ 101, *et seq.*

7 11 U.S.C. § 101(10A)(B)(IV) (CMI "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").
8 A Department of Veterans Affairs annual benefits report indicated that more than 5 million veterans and survivors/dependents receive these benefits. See "VBA Annual Benefits Report Fiscal Year 2018," available at benefits.va.gov/REPORTS/abr (last visited Sept. 3, 2019).
9 See 11 U.S.C. §§ 707(b), 1129(a)(15), 1325(b)(2). The chapter 12 disposable-income test, 11 U.S.C. § 1225(b)(1)(B), and the disposable-income test applicable to individual cases under new subchapter V created by the SBRA do not incorporate CMI and are thus unaffected.
10 11 U.S.C. § 704(b).
11 11 U.S.C. § 707(b).

SBRA

The SBRA creates a new subchapter V of chapter 11¹² for “small business debtors” as currently defined in the Bankruptcy Code.¹³ If the debtor’s primary business activity is owning single-asset real estate, the debtor is not considered a small business debtor.¹⁴

Under the SBRA, a small business debtor may elect to have its case administered under subchapter V. Absent such an election, the small business case will be administered under the small business provisions of chapter 11 that have been in effect since 2005.

A full analysis of the provisions of subchapter V is beyond the scope of this article. However, the principal changes for subchapter V cases include the following:

- A trustee will be appointed in every case to perform a variety of duties ranging from facilitating the development of a consensual reorganization plan to appearing in court at status conferences and hearings on major issues (*e.g.*, property valuation, plan confirmation and plan modification).¹⁵
- No creditors’ committee will be appointed unless the court orders one appointed for cause.¹⁶
- The plan must be filed within 90 days after the order for relief. Only the debtor may file a plan.¹⁷
- No disclosure statement is required absent a court order, but the plan must contain certain basic disclosures.
- The plan may provide for the modification of rights of holders of a claim secured by a security interest in the debtor’s principal residence if the new value secured by the security interest was not used primarily to acquire the property and was used primarily for the debtor’s business.
- If all impaired classes vote to accept the plan, confirmation will be considered consensual, with three consequences: (1) the claims will be discharged upon confirmation; (2) the trustee’s services will be terminated upon substantial plan consummation; and (3) the reorganized debtor will be responsible for making plan payments to creditors.
- The rules in subchapter V for nonconsensual confirmation differ quite radically from the rules for cramdown in ordinary chapter 11 cases. A creditor’s ability to block confirmation by rejecting the plan is significantly weakened. The absolute priority rule is abrogated. If one or more impaired classes does not accept the plan, the court may confirm it nonconsensually if the court finds that the plan does not discriminate unfairly, and is fair and equitable with respect to each impaired class of claims or interests that has not accepted the plan. Although the definition of “fair and equitable” in ordinary chapter 11 cases incorporates the traditional absolute-priority rule,¹⁸ the definition of “fair and equitable” in subchapter V applies

a test similar to the chapter 12 disposable-income test.¹⁹ If the subchapter V plan is confirmed nonconsensually, the trustee will continue to serve (and be compensated) for the three- to five-year term of the plan. The debtor will make payments to the trustee, who will make distributions to claimants under the plan.

- Subchapter V debtors are excused from the statutory obligation to pay quarterly fees to the U.S. Trustee System Fund.²⁰

The SBRA will become effective on Feb. 19, 2020, for cases filed on or after that date.²¹ The U.S. Trustee is required to appoint a trustee for each subchapter V case.²² Although the SBRA authorizes the U.S. Trustee to appoint standing trustees to serve in all subchapter V cases in their judicial districts, the SBRA does not require it. If the U.S. Trustee does not appoint a standing trustee, the U.S. Trustee will appoint a disinterested individual in each particular subchapter V case to serve as trustee (a “case-by-case trustee”).²³

Between now and the SBRA’s effective date, the USTP must identify a pool of individuals, likely at least 200, who have the interest and the qualifications to serve as subchapter V trustees. These individuals must have skills beyond those of an asset liquidator or disbursing agent.

Real acumen in smaller businesses will be highly desirable, given the trustee’s obligation to aid the debtor in its rehabilitation and in the development of a workable and acceptable chapter 11 plan. The trustee must also have the capability to receive and distribute funds in nonconsensual cases, and must be able to perform the trustee’s duties while understanding the appointment’s economics. A partner in a law firm accustomed to billing clients for \$1,000 per hour might find it difficult to recover the partner’s normal fees in a subchapter V case.

The USTP will soon solicit applications from the bankruptcy community and others who might be qualified to serve as subchapter V trustees. While currently serving private trustees — many of whom are likely well qualified — are eligible to apply, the USTP urges all qualified and interested individuals to apply for consideration as a subchapter V trustee candidate as soon as possible in response to the advertisements the USTP will soon issue.

At least initially, the U.S. Trustees will likely appoint case-by-case trustees from pools established in each district through an application process, which could include interviews. The USTP does not anticipate assembling panels as it does in each district for chapter 7 cases, and appointments will not be made through a strictly blind rotation. Rather, the U.S. Trustee will appoint a trustee based on the nature of the debtor and whether a trustee candidate possesses special skills that make the candidate especially suitable for the appointment.²⁴

12 11 U.S.C. §§ 1181-1195.

13 11 U.S.C. § 101(51D). A small business debtor is defined as a chapter 11 debtor that is engaged in commercial or business activities and has no more than \$2,725,625 (excluding debts owed to affiliates or insiders) in noncontingent liquidated secured and unsecured debt, not less than 50 percent of which arose from the commercial or business activities of the debtor.

14 *Id.*

15 11 U.S.C. § 1183(a), (b).

16 11 U.S.C. § 1102(a)(3). This amendment applies to all small business cases, whether or not the debtor elects to proceed under subchapter V.

17 11 U.S.C. § 1189.

18 11 U.S.C. § 1129(b)(2).

19 11 U.S.C. § 1191(b); 11 U.S.C. § 1225(b).

20 Pub. L. No. 116-54, § 4(b)(3) (amending 28 U.S.C. § 1930(a)(6) to exclude cases under subchapter V from cases responsible for payment of quarterly fees).

21 Pub. L. No. 116-54, § 5.

22 11 U.S.C. § 1183(a).

23 *Id.*

24 The USTP will track and analyze subchapter V filings to determine whether the appointment of one or more standing trustees in a district would result in increased efficiency and decreased costs to the estate.

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The U.S. Trustee is specifically required to monitor and supervise subchapter V trustees and cases.²⁵ As part of this supervision, the USTP will develop uniform protocols for reporting by subchapter V trustees to enable the U.S. Trustees to evaluate the performance of subchapter V trustees just as they monitor trustees under other chapters.

Moreover, the USTP does not anticipate that its monitoring of these chapter 11 cases will be substantially lessened compared to non-subchapter V cases simply because of the trustee appointments. For example, the U.S. Trustee will still conduct initial debtor interviews, most likely in consultation with the trustee, and will review monthly operating reports as part of its general oversight of the cases, as well as seek to convert or dismiss subchapter V cases or remove a debtor from possession and put the trustee in possession (when

appropriate).²⁶ In keeping with the USTP's traditional oversight duties, the U.S. Trustee will review applications by the debtor to retain professionals, applications by those professionals for compensation and the compensation requests of subchapter V trustees.

Conclusion

Both the HAVEN Act and the SBRA represent efforts to expand the availability of bankruptcy relief to different populations of debtors. Along with that expansion, the USTP will continue to uphold its statutory duties to prevent abuse and provide effective oversight across the bankruptcy system. The USTP will continue to analyze the new statutory provisions and will participate in cases as necessary to ensure a consistent application of the law. **abi**

²⁵ 28 U.S.C. § 586(a)(3).

²⁶ 11 U.S.C. § 1185.

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