

Legislative Update

BY MAURICE “MAC” VERSTANDIG

Soldiers and Recent Veterans May Soon Be Subject to the Means Test

Editor’s Note: *ABI’s Task Force on Veterans and Servicemembers Affairs provides accessible resources for military members. Please visit veterans.abi.org for more information.*

For the past 15 years, there have been five ways for natural persons to seek chapter 7 relief: (1) satisfy the so-called “means test”; (2) show a majority of debt to be of a nonconsumer nature; (3) be a disabled veteran who incurred debts while an active duty member of the U.S. military; (4) be a disabled veteran who incurred debts while actively performing a homeland defense activity; or (5) have been on active duty — or performing a homeland defense activity — in the preceding 540 days.¹ However, there may soon be only four such pathways to chapter 7.

The latter provision — which exempts from the means test active-duty members of the armed forces and those who have recently completed active-duty service — is set to expire on Dec. 20, 2023. Unless the provision covering nondisabled servicemembers is renewed, the expiration will have a potentially profound impact on who is eligible for chapter 7 relief and who must instead propose a chapter 13 payment plan.

Section 707, the Means Test and Its Exceptions

Section 707 has long furnished a multi-faceted — and, to a layperson, oft-confusing — income-based test for those seeking chapter 7 relief.² At its core, the formula questions whether one’s income is above or below the median income for a comparably sized household in the same jurisdiction.³ Myriad eccentricities impact the computation,⁴ and the test only applies to “an individual [chapter 7 debtor] whose debts are primarily consumer debts.”⁵

Originally introduced as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the means test has always contained an exemption for disabled veterans who incurred relevant debts while on active duty or while “performing a homeland defense activity.”⁶

In 2008, § 707 was amended to also exempt from the means test those who are either on active duty, or who have completed such active duty within the preceding 540 days — without regard to whether the debtor became disabled as a consequence of service in the armed forces.⁷

The 2008 amendment profoundly widened the means test exemption available to members of the armed forces and veterans. Not only would one no longer need to be a “disabled veteran” to be exempted from the barrier to chapter 7 entry, but one would also not have to show any correlation between her/his military service and the debts sought to be discharged.⁸ The only caveat was — and remains — that on or after Sept. 11, 2001, “the debtor, while a member of a reserve component of the Armed Forces or a member of the National Guard, was called to such active duty or performed such homeland defense activity.”⁹

Temporal Oddity

Although not codified until 2008, the means test exception for a nondisabled veteran has always been pegged to the performance of military service (or homeland defense activity) after 2001. Given that the statute’s language only provides a 540-day safe harbor after the expiration of active-duty service, the temporal requirement has always been something of a surplusage. While Sept. 11, 2001, is a meaningful date *vis-à-vis* commencing military service, the relevant language was not codified until more than seven years after that momentous occasion in American history.¹⁰

Since BAPCPA would not come until four years after that attack, the original language of the Bankruptcy Code would have controlled the chapter 7 petition of any armed service members who left active duty prior to that fateful day. The pre-BAPCPA language not only lacked the means test, it was also quite permissive, allowing the dismissal of a case only “for cause, including — (1) unreasonable delay by the debtor that is prejudicial to creditors; and (2) nonpayment of any fees and charges required under chapter 123 of title 28.”¹¹

While the nondisabled veteran exemption has been pegged to post-9/11 service since the lan-



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¹ 11 U.S.C. §§ 707(b)(1), 707(b)(2)(D).

² 11 U.S.C. § 707(b)(2)(A).

³ *Id.*

⁴ *Id.*

⁵ 11 U.S.C. § 707(b)(1).

⁶ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8 (April 20, 2005), 119 Stat. 23.

⁷ National Guard and Reservists Debt Relief Act of 2008, P.L. 110-438 (Oct. 20, 2008).

⁸ *Id.*; 11 U.S.C. § 707(b)(2)(D).

⁹ 11 U.S.C. § 707(b)(2)(D)(ii).

¹⁰ National Guard and Reservists Debt Relief Act of 2008, P.L. 110-438 (Oct. 20, 2008).

¹¹ An Act to Establish a Uniform Law on the Subject of Bankruptcies, P.L. 95-598 (Nov. 6, 1978).

guage's statutory incipency, the temporal constant has also never been material. By definition, every active duty servicemember who has filed for chapter 7 relief since 2008, or has left active duty and filed for chapter 7 within 540 days of her/his departure from active duty, performed at least part of their qualifying service after Sept. 11, 2001.

Expirations and Renewals

The original 2008 language broadening the armed services exception to the means test contained a sunset provision for three years after the date of the statute's enactment.¹² In December 2011, days before the language was set to lapse, the provision was extended an additional four years.¹³ When that extension was scheduled to lapse in 2015, a four-year extension was passed with just two days to spare,¹⁴ then another four years were tacked on in 2019, this time several months before the extant duration was scheduled to pass.¹⁵

With the current extension set to lapse on Dec. 20, 2023,¹⁶ Rep. Steve Cohen (D-Tenn.) has introduced the National Guard and Reservists Debt Relief Extension Act of 2023.¹⁷ As of September 2023, there are only three co-sponsors for the legislation: Reps. Ben Cline (R-Va.), Madeleine Dean (D-Pa.) and Tim Burchett (R-Tenn.), although the four rep-

resentatives do exemplify bipartisan support. The legislation was referred to the House Judiciary Committee on May 15, 2023, with no action having been taken since and with no accompanying bill having been introduced in the Senate.¹⁸

Potential Impact of Lapse

Should the pending legislation, or comparable legislation, not be enacted prior to Dec. 20, 2023, means-test compliance will become a very real issue for many servicemembers and veterans who would not previously have had occasion to question their own chapter 7 eligibility. While the current, and anticipated forthcoming, rise in chapter 13 filings is no doubt far more attributable to the post-COVID-19 resurrection of foreclosure proceedings in myriad states, it necessarily stands to reason that some current and former members of the armed forces will also find themselves among the ranks of those committing to lengthier — and more economically arduous — bankruptcy cases, by reason of the safe-harbor provisions of § 707 shrinking.

A lapse of the statute would also invite necessary questions about the treatment of cases filed prior to Dec. 20, 2023. The current iteration of Form 122A-1 allows debtors to check a box that states, "The Means Test does not apply now because of qualified military service but it could apply later." On its face, this language seems to at least envision a

12 National Guard and Reservists Debt Relief Act of 2008, P.L. 110-438, at § 4 (Oct. 20, 2008).

13 National Guard and Reservist Debt Relief Extension Act of 2011, P.L. 112-64, at ¶ 2 (Dec. 13, 2011).

14 National Guard and Reservist Debt Relief Extension Act of 2015, P.L. 114-107 at ¶ 2 (Dec. 18, 2015).

15 National Guard and Reservist Debt Relief Extension Act of 2019, P.L. 116-53 at ¶ 2 (Aug. 23, 2019).

16 *Id.*

17 National Guard and Reservist Debt Relief Extension Act of 2023, H.R. 3315, 118th Cong. (2023).

18 *Id.*

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Thank You for Your Service

SPECIAL LETTER FROM RICHARD P. CARMODY

"I was just doing my job." Those were the words of Captain Larry L. Taylor when he was recently interviewed after being informed by President Joe Biden, in a phone call, that his Silver Star awarded in Vietnam was being upgraded to a Congressional Medal of Honor.

Captain Taylor's reaction caused me to reflect on my eight years of service in the Army Field Artillery, including two tours in Vietnam. As a college student in the early 1960s, military service seemed almost inevitable, so the Reserve Officers' Training Corps (ROTC) was a pragmatic — not a patriotic — decision. I thought that I had gamed the system by selecting the Air Defense Artillery, but upon graduation, the Army switched me to Field Artillery. During my service, I was doing my job (in addition to maturing), whether it was training, combat or teaching ROTC. So, frankly, I have mixed emotions when colleagues say, "Thank you for your service." I know that they are sincere, but my service pales in comparison to those who fought in the World Wars.

In 2018, ABI took a big step beyond "Thank you for your service" when incoming ABI President **Ted Gavin** of Gavin/Solmonese LLC (Wilmington, Del.) announced the formation of the Task Force on Veterans and Servicemembers Affairs. Immediately, the task force picked up on the issue of unequal treatment of veterans' disability benefits under the Bankruptcy Code. The efforts of the Legislative Committee (Tiger Team) were instrumental in encouraging Congress to pass the Honoring American Veterans in Extreme Need Act, which was signed into law on Aug. 23, 2019 (warp speed for such legislation).

The task force could have reported "Mission Accomplished" to ABI's leadership and rested on its laurels, but the members instead looked for other ways to provide insightful information about bankruptcy law and *pro bono* resources to veterans and organizations serving veterans. This information has been compiled at veterans.abi.org. All ABI members should have this site bookmarked, because you never know when you will meet a veteran who needs help or someone who provides services to veterans. What will you find on the website?

1. *Legal Resource Database*: helps locate legal services, programs and other resources in specific areas of the nation.
2. *Resources*: analysis and references, plus videos and webinars of veteran-oriented programs and testimony.
3. *Frequently Asked Questions*: insightful discussions on topics related to U.S. statutes affecting veterans and current servicemembers.
4. *Task Force Members*.
5. *Committee Descriptions*.

To honor Veterans Day, I have two more requests. Please make sure that your state and local bar sections have the information about ABI's Task Force on Veterans and Servicemembers Affairs, and please offer yourself as a liaison to help make connections. Also consider getting involved in one of the organizations listed in the database. That way, when we next meet, I will be the one saying, "Thank you for your service."



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universe in which a service-centric exemption is applicable when a bankruptcy petition has been filed but ceases to be applicable before a discharge is entered.

Case law supports the proposition that the appropriate measuring date for the means test is the petition date.¹⁹ However, courts have not had occasion to consider the appropriate date for assessing a since-expired exemption from the means test. Lest the answer appear simple, it bears noting that, not long ago, practitioners were left questioning the rollback of subchapter V debt limits on already-filed cases before Congress tardily acted.

Section 707 does contemplate “a call or order to active duty in the Armed Forces” as a “special circumstance” that may permit a debtor to proceed under chapter 7 despite not being compliant with the means test.²⁰ Making such a showing, however, would seem a palpably heavier burden than merely demonstrating current (or recent) military service, as well as one available to far fewer people. Complicating matters, the U.S. Supreme Court has also intimated — arguably in *dicta*, and in a manner lending itself to conflicting interpretations — that the “special circumstances” exception to the means test is unavailable to debtors who have the “reasonable alternative” of seeking chapter 13 relief.²¹ **abi**

¹⁹ *In re Maya*, 374 B.R. 750, 753 (Bankr. S.D. Cal. 2007) (citing *In re Walker*, 2006 WL 1314125 (Bankr. N.D. Ga. 2006); *In re Littman*, 370 B.R. 820 (Bankr. D. Idaho 2007); *In re Wilkins*, 370 B.R. 815 (Bankr. C.D. Cal. 2007); *In re Haar*, 360 B.R. 759 (Bankr. N.D. Ohio 2007); *In re Kelvie*, 372 B.R. 56 (Bankr. D. Idaho 2007); *In re Benedetti*, 372 B.R. 90 (Bankr. S.D. Fla. 2007)).

²⁰ 11 U.S.C. § 707(b)(2)(B)(i).

²¹ *Hamilton v. Lanning*, 560 U.S. 505, 524 (2010) (“In any event, the ‘special circumstances’ exception is available only to the extent that ‘there is no reasonable alternative,’ a proposition we reject with our interpretation of § 1325(b)(1) today.”) (quoting 11 U.S.C. § 707(b)(2)(B)(i)).

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