

## **New Laws, New Duties: The United States Trustee Program’s Implementation of the HAVEN Act and the Small Business Reorganization Act**

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On August 23, 2019, President Trump signed into law four significant pieces of legislation affecting the bankruptcy system: the Small Business Reorganization Act (“SBRA”),<sup>1</sup> the Honoring American Veterans in Extreme Need Act (“HAVEN Act”),<sup>2</sup> the Family Farmer Relief Act,<sup>3</sup> and the National Guard and Reservists Debt Relief Extension Act.<sup>4</sup> 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 United States Trustee Program (“USTP”) will likewise adjust its exercise of its statutory oversight and enforcement responsibilities to faithfully implement both new statutes and has assembled teams of experienced field and Executive Office personnel to review and recommend changes to the USTP’s practices and to identify legal issues involved in implementing the new laws.<sup>5</sup>

### **HAVEN Act**

The HAVEN Act excludes certain disability and death-related benefits payable to veterans and their survivors from the Bankruptcy Code’s<sup>6</sup> definition of “current monthly income” (“CMI”).<sup>7</sup> 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

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<sup>1</sup> Pub. L. No. 116-54 (2019).

<sup>2</sup> Pub. L. No. 116-52 (2019).

<sup>3</sup> 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).

<sup>4</sup> Pub. L. No. 116-54 (2019) (extending for an additional four years the existing exemption from the 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).

<sup>5</sup> The USTP recognizes James L. Snyder, Acting United States Trustee for Region 12, and Daniel J. Casamatta, Acting United States Trustee for Region 13, for their diligent work coordinating these efforts.

<sup>6</sup> 11 U.S.C. §§ 101 *et seq.*

<sup>7</sup> 11 U.S.C. § 101(10A)(B)(IV) (“The term ‘current monthly income’ . . . 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.”).

the Department of Veterans Affairs.<sup>8</sup> Retired pay is excluded from CMI only if it is pay the debtor receives because of disability. The Act's amendments apply to means testing or disposable income calculations in individual cases under chapters 7, 11, and 13.<sup>9</sup>

The USTP reviews all individual chapter 7 cases for abuse,<sup>10</sup> including the presumption of abuse that may arise under the means test and abuse that may arise based on the debtor's bad faith or under the totality of the circumstances.<sup>11</sup> By modifying the definition of "current monthly income," the HAVEN Act directly changes the means testing analysis under section 707(b)(2) of the Code, but it does not explicitly affect dismissal under the bad faith or totality of the circumstances provisions of section 707(b)(3) of the Code.

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.

## **SBRA**

SBRA creates a new subchapter V of chapter 11<sup>12</sup> for "small business debtors" as currently defined in the Bankruptcy Code.<sup>13</sup> If the debtor's primary business activity is owning single asset real estate, the debtor is not a small business debtor.<sup>14</sup>

Under 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 in effect since 2005.

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<sup>8</sup> The Department of Veterans Affairs' 2018 annual benefits report indicates that over 5 million veterans and survivors/dependents receive these benefits. See <https://www.benefits.va.gov/REPORTS/abr/> (accessed July 16, 2019).

<sup>9</sup> 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.

<sup>10</sup> 11 U.S.C. § 704(b).

<sup>11</sup> 11 U.S.C. § 707(b).

<sup>12</sup> 11 U.S.C. §§ 1181-1195.

<sup>13</sup> 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.

<sup>14</sup> *Id.*

A full analysis of the provisions of subchapter V is beyond the scope of this article. Among the principal changes for subchapter V cases are:

- A trustee will be appointed in every case to perform a variety of duties ranging from facilitating the development of a consensual plan of reorganization to appearing in court at status conferences and at hearings on major issues such as property valuation, plan confirmation, and plan modification.<sup>15</sup>
- No creditors' committee will be appointed unless the court orders one appointed for cause.<sup>16</sup>
- The plan must be filed within 90 days after the order for relief. Only the debtor may file a plan.<sup>17</sup>
- 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 these consequences: (1) the claims will be discharged upon confirmation; (2) the trustee's services will be terminated upon substantial consummation of the plan; and (3) the reorganized debtor will be responsible for making plan payments to creditors.
- The rules in subchapter V for non-consensual confirmation differ quite radically from the rules for cram-down in ordinary chapter 11 cases. The creditors' 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 non-consensually 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,<sup>18</sup> the definition of "fair and equitable" in subchapter V applies a test similar to the chapter 12 disposable income test.<sup>19</sup> If the subchapter V plan is confirmed non-consensually, the trustee will continue to serve (and be compensated) for the 3- to 5-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 United States Trustee System Fund.<sup>20</sup>

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<sup>15</sup> 11 U.S.C. § 1183(a), (b).

<sup>16</sup> 11 U.S.C. § 1102(a)(3). Note that this amendment applies to all small business cases, whether or not the debtor elects to proceed under subchapter V.

<sup>17</sup> 11 U.S.C. § 1189.

<sup>18</sup> 11 U.S.C. § 1129(b)(2).

<sup>19</sup> 11 U.S.C. § 1191(b), 11 U.S.C. § 1225(b).

<sup>20</sup> 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).

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

Between now and the effective date of SBRA, 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 a 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 non-consensual cases. And the trustee must be able to perform the trustee’s duties 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 may 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 United States 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 the appointments will not be made through a strictly blind rotation. Rather, the United States Trustee will appoint a trustee based upon the nature of the debtor and whether a trustee candidate possesses special skills that make the candidate especially suitable for the appointment.<sup>24</sup>

The United States Trustee is specifically required to monitor and supervise subchapter V trustees and cases.<sup>25</sup> As part of this supervision, the USTP will develop uniform protocols for reporting by subchapter V trustees to enable the United States 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 United States Trustee will still conduct initial debtor interviews, most likely in consultation with the trustee. The United States Trustee will review monthly

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<sup>21</sup> Pub. L. No. 116-54, § 5.

<sup>22</sup> 11 U.S.C. § 1183(a).

<sup>23</sup> *Id.*

<sup>24</sup> The United States Trustee Program will track and analyze subchapter V filings to determine if the appointment of one or more standing trustees in a district would result in increased efficiency and decreased costs to the estate.

<sup>25</sup> 28 U.S.C. § 586(a)(3).

operating reports as part of its general oversight of the cases. The United States Trustee will, when appropriate, seek to convert or dismiss subchapter V cases or to remove a debtor from possession and put the trustee in possession.<sup>26</sup> And in keeping with the USTP's traditional oversight duties, the United States 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 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.

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<sup>26</sup> 11 U.S.C. § 1185.