

BY JAY BENDER, ELIZABETH L. GUNN AND JOHN H. THOMPSON¹

Defending Our Veterans

Excluding Veterans' Benefits from Current Monthly Income



Jay Bender
Bradley Arant Boulton
Cummings LLP
Birmingham, Ala.



**Coordinating Editor
Elizabeth L. Gunn**
Office of the Attorney
General; Richmond, Va.



John H. Thompson
McGuireWoods LLP
Washington, D.C.

Jay Bender is a partner with Bradley Arant Boulton Cummings LLP. Elizabeth Gunn is the bankruptcy specialist for Virginia's Division of Child Support Enforcement. John Thompson is a partner with McGuireWoods LLP.

Editor's Note: *The authors are members of ABI's Task Force on Veterans and Servicemembers Affairs. Mr. Bender and Mr. Thompson are co-chairs of the Task Force's Legislative Subcommittee. For more information, please contact Task Force Chair John W. Ames (Bingham Greenebaum Doll LLP; Louisville, Ky.) at james@bgdlegal.com.*

Part of the mission of ABI's newly formed Task Force for Veterans and Servicemembers Affairs is to "remediate and prevent adverse debt concerns and impacts on veterans and servicemembers to ensure that we financially strengthen those that strengthen us with the respect and dignity they deserve." To that end, the Task Force has focused much of its initial attention on the Bankruptcy Code's perplexing and inequitable treatment of veterans' benefits in consumer bankruptcy cases.

While the Code excludes benefits received by individuals under the Social Security Act from the definition of "current monthly income" and thus from an individual's "disposable income," the Code inexplicably provides no comparable exclusions for benefits received through the U.S. Department of Veterans Affairs or otherwise on account of a veteran's service. The disparate treatment of veterans' benefits presents significant hardship to some veterans, compelling them to devote these benefits — including their disability benefits — to the funding of their chapter 13 plans and restricting their ability to seek relief under chapter 7 rather than under chapter 13.

Overview: Veterans' Benefits Pre- and Post-BAPCPA

For years, there was little (if any) debate about whether veterans' benefits paid through the Department of Veterans Affairs should be included in the debtor's "disposable income." Prior to 2005, the Bankruptcy Code allowed bankruptcy judges to exercise their discretion, based on the facts of each case, in determining what constituted a debtor's disposable income. Under the pre-2005 Code, "disposable income" was defined in 11 U.S.C. § 1325(b)(2) as:

[I]ncome which is received by the debtor and which is not reasonably necessary to be expended —

(A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions....

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

Under this definition, it was accepted that veterans' benefits should not be considered part of a chapter 13 debtor's "disposable income." No published opinions interpreting the pre-2005 "disposable income" definition even considered that possibility, no less ruled that veterans benefits affirmatively constituted disposable income.

All that changed with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).² Through BAPCPA, Congress divested bankruptcy judges of the discretion they previously had to decide what would — and would not — constitute "disposable income" in a debtor's case. Congress did so by revising § 1325(b)(2) to make "current monthly income" the starting point for calculating a debtor's disposable income. A new phrase to the Bankruptcy Code, "current monthly income" was generally defined by Congress to mean the average monthly income from all sources that the debtor receives, as well as any other amount paid by an entity other than the debtor for the household expenses of the debtor or the debtor's dependents.³

From this broad definition, Congress specifically excluded three sources of income: (1) benefits received under the Social Security Act; (2) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes; and (3) payments to victims of terrorism on account of their status as victims of such terrorism.⁴ For reasons that are not clear,⁵ veterans' benefits provided through the Department of Veterans Affairs were not excluded from the Bankruptcy Code's "current monthly income" definition.

Post-BAPCPA Case Law

Following BAPCPA, at least five courts have addressed whether a debtor's disposable income

¹ The opinions expressed herein are provided as a result of Ms. Gunn's own experiences and not as a representative of the Attorney General or the Division of Child Support Enforcement. She is also an honoree of ABI's 2017 "40 Under 40" class. In addition, Mr. Thompson served as a captain and helicopter pilot in the U.S. Army before earning his law degree.

² Pub. L. 109-8, 119 Stat. 23.

³ 11 U.S.C. § 101(10A).

⁴ *Id.*

⁵ BAPCPA's legislative history does not address why veterans' benefits were not excluded from the "currently monthly income" definition.

includes veterans' benefits.⁶ In each of these cases, the bankruptcy court held that because veterans' benefits are not specifically excluded from the Bankruptcy Code's definition of "current monthly income," these benefits must be counted as part of a debtor's disposable income. As a result, the bankruptcy judge denied confirmation of the debtor's proposed chapter 13 plan in each of these cases because the plan failed to commit all of the debtor's disposable income to funding the plan as required by 11 U.S.C. § 1325(b)(1)(B).

The most recent of those opinions is illustrative of these cases. In *In re Brah*, the chapter 13 trustee objected to a husband and wife's joint chapter 13 plan, arguing that it was unconfirmable because the debtors failed to include their veterans' disability benefits in their disposable income calculation upon which the plan was based.⁷ The debtors countered that because their veterans' benefits were not assignable nor subject to levy, seizure or attachment under applicable non-bankruptcy law,⁸ they were not obligated to dedicate those benefits toward funding their plan.

The *Brah* court sided with the trustee, finding §§ 101(10A) and 1325(b)(2) to mandate unambiguously that the debtors include their veterans' disability benefits in their current monthly income. The court surmised that had Congress intended to exclude otherwise-exempt assets from the disposable-income calculation, it could have done so by expressly excluding such assets from the definition of "current monthly income" in § 101(10A).⁹ In reaching its holding, the *Brah* court noted and addressed the puzzling discrepancy between the treatment of Social Security benefits and veterans' benefits in chapter 13 cases:

Although the exclusion of Social Security benefits from current monthly income suggests that [Department of Veterans Affairs] Benefits also should be excluded, the statutory exception applies only to "benefits received under the Social Security Act."... [T]he Court understands why the Debtors seek the same exclusion for their veterans' disability benefits as afforded to recipients of Social Security disability benefits. But creating this exception is a job for Congress, not the Court. The Debtors' ability to exempt these benefits does not remove the [Department of Veterans Affairs] Benefits from the Bankruptcy Code definition of current monthly income. And the fact that the benefits are not subject to attachment, garnishment or other legal process does not render the benefits immune from the disposable income calculation in a voluntary Chapter 13 plan. Accordingly, the Trustee's objection is sustained and the [Department of Veterans Affairs] Benefits should be included in the Debtors' disposable income.¹⁰

Brah and the four cases preceding it all analyzed whether veterans' benefits were a part of a debtor's disposable income in the context of considering confirmation of a proposed

chapter 13 plan. However, the issue has wider implications, extending to the threshold question of the chapters of the Bankruptcy Code under which a veteran can seek relief.

As part of BAPCPA, Congress enacted its "means test" for determining an individual consumer debtor's eligibility to file for chapter 7 relief. Codified in § 707(b) of the Bankruptcy Code, the means test evaluates whether an individual's chapter 7 filing might be abusive by, in part, looking at the amount of his/her current monthly income.¹¹ Under that test, the greater a debtor's current monthly income, the greater the likelihood that the debtor's chapter 7 filing will be presumed abusive. Including veterans' benefits in a veteran's current monthly income calculation might decrease the availability of chapter 7 relief to veterans.

The negative impact of means testing on veterans is tempered to some extent by 11 U.S.C. § 707(b)(2)(D), which provides that a court may not dismiss or convert a chapter 7 case filed by an individual for abuse, based on any form of means-testing, if that individual falls within a limited category of veterans.¹² However, that exclusion is narrow, offering no protection for a veteran whose service ended more than 540 days before his/her bankruptcy filing and whose debts arose primarily after his/her service concluded.

Correcting the Code

There is no sensible basis for the Bankruptcy Code treating benefits paid to veterans through the Department of Veterans Affairs differently than benefits received by individuals from the Social Security Administration. The disparate treatment results in systematic discrimination against veterans, even if wholly unintentional. Consistent with its mission, ABI's Task Force on Veterans and Servicemembers Affairs plans on bringing increased attention to this issue in the hope that veterans will soon be relieved of the adverse effects of the Bankruptcy Code's problematic "current monthly income" definition.

At least one piece of legislation has been drafted to provide veterans with such relief. Written with input from veterans organizations and bankruptcy professionals, the Honoring American Veterans in Extreme Need Act (HAVEN Act)¹³ proposes to amend the Bankruptcy Code's definition of "current monthly income" to specifically exclude from that definition veterans' disability benefits and a wide range of other veterans' benefits.¹⁴ Earlier this year, Sen. Tammy Baldwin (D-Wis.) proposed the HAVEN Act as an amendment¹⁵ to the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (the "NDAA Act"); however, her amendment was not adopted prior to passage of the NDAA Act.

11 11 U.S.C. § 707(b)(2)(A).

12 Section 707(b)(2)(D) provides specifically that the court may not dismiss or convert a case based on any form of means testing (1) if the debtor is a disabled veteran and the debtor's indebtedness occurred primarily during a period during which the veteran was (a) on active duty or (b) performing a homeland defense activity; or (2) with respect to the debtor, while the debtor is (a) on, and during the 540-day period beginning immediately after the debtor is released from, a period of active duty of not less than 90 days, or (b) performing, and during the 540-day period beginning after the debtor is no longer performing, a homeland defense activity performed for a period of not less than 90 days; if 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.

13 For the complete text of the HAVEN Act, see 164 Cong. Rec. S3633 (daily ed. June 11, 2018) (proposed Senate Amendment 2643 to Senate Amendment 2282 to H.R. 5515).

6 *In re Brah*, 562 B.R. 922 (Bankr. E.D. Wis. 2017); *In re Hedge*, 394 B.R. 463 (Bankr. S.D. Ind. 2008); *In re Waters*, 384 B.R. 432 (Bankr. N.D. W.Va. 2008); *In re Wyatt*, 2008 WL 4572506 (Bankr. E.D. Va. Oct. 10, 2008); *In re Redmond*, 2008 WL 1752133 (Bankr. S.D. Tex. April 14, 2008). For a discussion of these cases, see Jay Bender, "The Unequal Treatment of Veterans and Veterans' Disability Benefits Under the Bankruptcy Code," *Norton Bankruptcy Law Adviser*, v. 2017, issue 6 (June 2017).

7 562 B.R. at 923.

8 38 U.S.C. § 5301(a)(1).

9 562 B.R. at 923.

10 *Id.* at 924, 925-26.

continued on page 69

Defending Our Veterans: Excluding Veterans' Benefits from Monthly Income

from page 13

Correcting the Bankruptcy Code's unfair treatment of veterans' benefits is overdue, and the ABI Task Force for Veterans and Servicemembers Affairs is optimistic that the HAVEN Act will soon be passed with the bipartisan support that it deserves. Meanwhile, the ABI Task Force will continue to look for additional ways to improve the bankruptcy process to better meet the needs of financially distressed veterans and servicemembers. We encourage all ABI members to help the Task Force's mission and share your ideas about where such improvements can be made. **abi**

¹⁴ In addition to the existing exclusions under 11 U.S.C. § 101(10A), the HAVEN Act proposes to exclude from "current monthly income" (1) compensation under chapter 11 of title 38; (2) compensation under chapter 13 of title 38; (3) pensions under chapter 15 of title 38; (4) retired pay payable to members of the Armed Forces retired under § 1201 or 1204 of title 10; (5) retired pay payable to members of the Armed Forces placed on the temporary disability retired list under § 1202 or 1205 of title 10; (6) disability severance pay payable under § 1212 of title 10 to members separated from the Armed Forces under § 1203 or 1206 of that title; (7) retired pay payable in accordance with § 1201 or 1202 of title 10, or disability severance pay payable in accordance with § 1203 of that title, to members of the Armed Forces eligible for such pay by reason of § 1207a of that title; (8) combat-related special compensation payable under § 1413a of title 10; (9) any monthly annuity payable under the Survivor Benefit Plan under subchapter II of chapter 73 of title 10 if the participant in the plan with respect to whom the annuity is payable was retired for physical disability under chapter 61 of that title; (10) the special survivor indemnity allowance payable under § 1450(m) of title 10; and (11) any monthly special compensation payable to members of the uniformed services with catastrophic injuries or illnesses under § 439 of title 37.

¹⁵ 164 Cong. Rec. S3633 (daily ed. June 11, 2018).

Copyright 2018
American Bankruptcy Institute.
Please contact ABI at (703) 739-0800 for reprint permission.