

Federal Legislation Year in Review

This session will discuss the CARES Act, the “Proposed” Consumer Bankruptcy Reform Act of 2020, and other changes to the practice realized during 2020

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CARES Act and Bankruptcy

I The CARES ACT

1. New Bankruptcy Provisions
 - a. Many debtor provisions that have no real effect on servicing
 - b. Plans confirmed prior to March 27, 2020 can be amended to allow for up to 84 month plan

II. Forbearance

1. What is forbearance
 - a. In General
 - i. Black’s Law- The act of abstaining from proceeding against a delinquent debtor; delay in exacting the enforcement of a right; indulgence granted to a debtor.
 - ii. In the Mortgage Context- Agreeing not to foreclose until a date certain.
 - b. Traditional forbearance agreements
 - i. Agreement defining rights and responsibilities
 - ii. Strict Construction
 - iii. Waiver of stay
 - iv. Admission of default
 - v. No defenses
 - vi. Allowance for attorneys’ fees
 - vii. Right to foreclose on a certain date
 - viii. At discretion of servicer
 - c. CARES ACT Forbearance
 - i. Forbearance (undefined) for 180 + 180 days
 - ii. At sole option of borrower
 - iii. No agreement
 - iv. No late charges

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- v. No attorneys' Fee
- d. Fannie, Freddie CFPB Forbearance
 - i. Suspension of payments

III. Can Forbearance be Requested During a Pending Bankruptcy?

IV. Must a Servicer Receive Court Approval to enter into a Forbearance?

V. Notice of Forbearance

- e. Some initial confusion
 - i. Payment Change Notice
 - ii. Letter to Trustee
- f. Current Practice-
 - i. Notice of Forbearance
 - ii. Notice of end of Forbearance
 - iii. Notice of new Forbearance period
- g. Note- If there is a payment change of a payment due during the forbearance period must still file Notice of Payment Change

VI Must a Servicer Return Payments Made During the Forbearance Period?

VII. Can you Seek Relief From Stay When There is a Forbearance?

- 1 Determining Factors
 - a. Chapter
 - b. Was there a pre-forbearance default?
 - c. Judge
- 2 What's happening with these motions?

VIII Can you Recover From the Borrower Attorneys' Fees When a Loan in Bankruptcy is also in Forbearance?

1. CARES Act- no fees... beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract
2. Can you recover fees in bankruptcy if the loan is current?
 - a. Type of Motions
 - i. Motion to Sell Free and Clear of Liens
 - ii. Motion for valuation
 - iii. Cram down plan

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- b. Motion for Relief from Stay
 - i. Chapter 7
 - ii. Chapter 13
- IX. What to do when the forbearance ends
- 1. Deferral
 - 2. Reinstatement Stipulation After Motion for Relief From Stay
 - 3. Plan Modification- throw forborne payment into Plan- Needs Court approval
 - 4. Loan Modification- Generally requires bankruptcy court approval

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Small Business Reorganization Act of 2019 - Subchapter V

- I. Subchapter V was effective on February 19, 2020, the Small Business Reorganization Act of 2019 (*Codified in the Bankruptcy Code at §§ 1181 to 1195*)
 - a. Quicker and more efficient Chapter 11 cases
 - b. Increase to the percentage of consensual plans

- II. The Election and Qualifications
 - a. Debtor must elect to be a Subchapter V Debtor and the election must be made on the petition. Fed. R. Bankr. P. 1020(a) (Interim rule which may be adopted by local rule)
 - i. If the Debtor elects, then the Subchapter V applies unless the “U.S. Trustee or party in interest” successfully objects to such election. Fed. R. Bankr. P. 1020(a)
 - ii. Who bears the burden of proof?
 1. Debtor – "When a debtor's eligibility to file under a particular chapter of the Bankruptcy Code is challenged, the burden is upon the debtor to establish such eligibility." In re Wright, 2020 Bankr. LEXIS 1240, at 6-7 (Bankr. D.S.C. Apr. 27, 2020) *citing* In re Voelker, 123 B.R. 749, 750 (Bankr. E.D. Mich. 1990)
 - b. Who can be a Subchapter V Debtor? Anyone who qualifies as Small Business Debtor under 11 U.S.C. §101(51D).

In this subchapter [11 USCS §§ 1181 et seq.]:
The term “debtor”—

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor; and

(B) does not include—

(i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$7,500,000 (excluding debt owed to 1 or more affiliates or insiders);

(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or

(iii) any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c))

11 U.S.C. § 1182(1)(A) (Note: The debt limited under the section was increased from \$2,725,625.00 to \$7,500,000 until March 27, 2021 unless otherwise extended by Congress)

c. Points of Argument

i. Commercial or Business activities (but not a single asset debtor)

1. "The test for determining whether a debt should be classified as a business debt, rather than as a consumer debt, is whether it was incurred with an eye toward profit...[c]ourts must look at the substance of the transaction and the borrower's purpose in obtaining the loan, rather than merely looking at the form of the transaction. A court's analysis should focus on the primary purpose for which the debt was incurred and should not take into consideration a subsequent recharacterization of the debt. In re Martin, No. 12-38024, 2013 Bankr. LEXIS 4020, 2013 WL 5423954, at *6 (Bankr. S.D. Tex. Sept. 26, 2013))

- ii. \$7,500,000 until March 27, 2021 (then returns to \$2,725,625.00 after – unless otherwise extended)
- iii. Not less than 50% of the debt arose from the business activities of the debtor

III. Important Provisions

a. Absolute Priority Rule (absence of)

- i. "Fair and Equitable" confirmation requirement eliminates the APR requirement, but still requires:

1) secured creditor to be paid at least the value of its interest in the subject collateral (11 U.S.C. §1129(b)(2)(A)); and

2) Disposable income must be paid into the plan for 3-5 years. (11 U.S.C. §1191(c)(2))

b. Modification of loans secured by a primary residence

i. In a traditional Chapter 11 case, cramdowns of primary residences are prohibited by 11 U.S.C. §1123(b)(5).

ii. While the cramdown requirements are seemingly unaffected in a Subchapter V case, a mortgage secured by a principal residences *may* be subject to a cramdown.

(3) notwithstanding section 1123(b)(5) of this title [11 USCS § 1123(b)(5)], may modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with the granting of the security interest was—

- (A) not used primarily to acquire the real property; and
- (B) used primarily in connection with the small business of the debtor.

11 USCS § 1190(3)

Factors to consider:

- “1. Were the mortgage proceeds used primarily to further the debtor's business interests;
2. Is the property an integral part of the debtor's business;
3. The degree to which the specific property is necessary to run the business;
4. Do customers need to enter the property to utilize the business; and
5. Does the business utilize employees and other businesses in the area to run its operations.”

In re Ventura, 615 B.R. 1, 25 (Bankr. E.D.N.Y. 2020)

iii. Of course, artificial debtors do not have principal residences (*See In re Body Transit, Inc.*, 613 B.R. 400, 407 n.10 (Bankr. E.D. Pa. 2020))

c. 1111(b) election appears to still available to creditors in a Subchapter V case

IV. Closing

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- a. Subchapter V has been around for slightly more than a year (most of which has been during the COVID-19 pandemic) so there are, at present, a small amount of reported decisions. As such, this area of the law is likely to continue to develop over the coming years

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**THE CONSUMER BANKRUPTCY REFORM ACT OF 2020;
S. 4991 — 116th Congress (the “Bill”)**

I. PURPOSE –

The Bill was proposed to reduce burdens on debtors by reducing the costs to file; streamlining the process to file; and creating a single chapter that allows debtors greater flexibility in addressing their debts thereby making it easier for debtors to reorganize and obtain a fresh start. One stated finding in the Bill is that “the inability of debtors to restructure home mortgage loans has led to unnecessary foreclosures that have created hardships for individuals and families and their communities without reducing cost of mortgage financing.”

II. STATUS –

The Bill was introduced at the end of the 116th session of Congress by Senator Elizabeth Warren, a leading advocate for bankruptcy reform, and did not make it to the floor for a vote. Since the 116th session is over the Bill was cleared from the books. Now that the 117th Session has begun we can expect that some or all of the proposals in the Bill will be proposed again in a new bill for consideration.

III. CHANGES

- a. Chapter 10** - The Bill would eliminate Chapters 7 and 13 and create Chapter 10 under 11 U.S.C. 1001 *et. seq.* which would be allow Debtors the opportunity to choose between seeking a chapter 7 like discharge or reorganizing the debts secured by properties.
- b. No Payment Discharge** – This option is reserved for low income/asset filers who cannot afford to repay debts and merely seek to obtain a discharge of their personal liability to pay their debts. If the debtor has non-exempt property whose value exceeds the liens or if the debtor’s annual income exceeds 134% of the median income for the state and household size the debtor would not be eligible for a no payment discharge.
- c. Payment Plans**
 - i. Filing of Plans.** 11 U.S.C. §1021 The debtor may file a plan to repay the debts of the debtor. The debtor may file multiple plans but only one plan may be confirmed. Once a plan is confirmed the debtor cannot file additional plans.

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- ii. **Contents of Plans.** 11 U.S.C. §1022. The debtor must satisfy the minimum payment obligation by either making deferred cash payments or tendering all non-exempt property to the trustee upon the trustee's request. However, if the trustee requests tender, the debtor may elect to pay the trustee under the repayment plan an amount equal to the value of the interest of the debtor in such property that is in excess of the sum of the claims secured by the property plus any applicable exemption.
- iii. **Repayment Plan That Solely Provides for Unsecured Claims.** 11 U.S.C. §1022(a)
 - 1. Maximum Term – 36 months and requires equal monthly installments.
- iv. **Residence Plan That Solely Provides for Claims Secured by Debtor's Principal Residence.** 11 U.S.C. §1022(b)
 - 1. May modify the rights of a holder of a claim secured by debtor's principal residence.
 - 2. May provide for the waiving or curing of a default within a reasonable time.
 - 3. Right to cure default no longer exists when debtor has no rights in property, including the right of redemption.
 - 4. Amount necessary to cure defaults determined in accordance with applicable non-bankruptcy law except cannot require interest on arrearages or a payment of any penalty rate, late fee, or a payment required under a penalty provision or a similar provision.
 - 5. The plan may allow debtor to sell any property that is the debtor's principal residence free and clear of any liens not earlier than 60 days and not later than 180 days after plan confirmation if the plan provides that
 - a. The debtor shall tender the property to the holder of the first-priority lien, subject to a lien secured by any allowed secured claim of a junior lienholder;
 - b. Upon acceptance of the tender, the debtor shall transfer the residence to the holder of the first lien not later than 14 days after acceptance of the tender; and
 - c. If there is not timely acceptance of the tender-
 - i. Sell the property free and clear of liens in a commercially reasonable manner; and
 - ii. After deducting the cost of the sale, any liens against the debtor's residence shall attach to the proceeds.
 - 6. The holder of an allowed secured claim that is not impaired cannot object to the Residence Plan

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7. If Claimant objects to plan the court can still confirm the plan if:
 - a. The holder retains the lien securing the claim;
 - b. That value, as of the effective date of the plan, of the payments to be made under the plan is not less than the amount of the secured claim.
 - i. The interest rate used to reduce the future stream of payments to present value is in the case of:
 1. A first priority lien, the current average prime offer rate for a loan of the most similar duration an type published by the CFPB; and
 2. Any other lien, a rate that is 300 basis points greater than the current average prime offer rate or a loan of the most similar duration an type as published by the CFPB. See §1022(h)
 - c. With the exception of payments to cure a default, the payments are made in equal monthly amounts;
 - d. A default under the plan constitutes default under the security agreement;
 - e. A default under the plan and security agreement will only exist if the debtor is more than 120 days delinquent on any payment under the Residence Plan;
 - f. The last payment on the Residence Plan is due on a date that is not later than the later of
 - i. 15 years after plan confirmation; or
 - ii. 5 years after the original maturity date of the loan; and
 - g. The debt subject to the Residence Plan has not previously been provided for by a residence plan that was confirmed within the previous six (6) years and completed.
- v. **Property Plan That *Solely* Provides for Claims Secured by Other Property of the Debtor.** 11 U.S.C. §1022(c).
1. The holder of an allowed secured claim that is not impaired cannot object.
 2. If Claimant objects to plan the court can still confirm the plan if:
 - a. The holder retains the lien securing the claim;
 - b. That value, as of the effective date of the plan, of the payments to be made under the plan is not less than the amount of the secured claim
 - i. There is an exception to motor vehicles acquired within 90 days prior to filing the petition;
 - c. The payments are made in equal monthly amounts;

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- d. A default under the plan constitutes default under the security agreement;
 - e. A default under the plan and security agreement will only exist if the debtor is more than 90 days delinquent on any payment under the Property Plan;
 - f. The last payment on the Property Plan is due on a date that is not later than the later of
 - i. 5 years after plan confirmation; or
 - ii. the original maturity date of the loan;
 - g. The debt subject to the Property Plan has not previously been provided for by a Property Plan that was confirmed within the previous six (6) years and completed.
 - h. With respect to a motor vehicle the Debtor provides evidence of insurance and the motor vehicle is used regularly by debtor or dependent; and
 - i. For non-auto property, the property is reasonably necessary for the support or maintenance of the debtor or dependent or for the continuation preservation and operation of a business owned or operated by debtor or dependent.
- d. Codebtor Stay** – §1009 creates a co-debtor stay similar to the current codebtor stay under §1301 and allows relief from the co-debtor stay on the same grounds as §1301 which is usually granted because the interest of the creditor would be irreparably harmed by continuation of the stay.
- e. Effect of Confirmation §1028**
- i. **Repayment Plan Injunction** prohibits action on collecting debts that are excepted from discharge if plan proposes to pay them until all payments have been made under the plan or the debtor is at least 90 days in default on making payments under the plan.
 - ii. **Residence Plan Injunction** prohibits action on collecting debts if plan proposes to pay them until all payments have been made under the plan or the debtor is at least 120 days in default on making payments under the plan.
 - iii. **Property Plan Injunction** prohibits action on collecting debts if plan proposes to pay them until all payments have been made under the plan or the debtor is at least 120 days in default on making payments under the plan.

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- iv. **Request For Relief From Injunction.** Allows parties in interest to request relief from Residence or Property Plan Injunctions

- f. **Discharge – Scope and Timing §1031**
 - a. The court shall grant the debtor a discharge as soon as practicable after
 - i. The date of confirmation of a *repayment* plan; or
 - ii. In the case of a debtor with no minimum payment obligation, the date on which the deadline for filing a *repayment* plan expires.
 - b. There are a number of exceptions to discharge listed.

- g. **Election of Limited Bankruptcy Proceedings §1051** This section allows the debtor to elect to conduct a limited proceeding that affects only claims secured by specific items of the property of the debtor. Automatic stay limited to those creditors with liens against the property subject to the limited proceeding. The case can later be converted to a general proceeding and upon conversion the automatic stay applies to all creditors.

- h. **Other Changes**
 - i. Elimination of pre-filing Credit Counseling requirement in 109(h).
 - ii. Allows the CFPB to appear in any bankruptcy case and raise and/or be heard on any issue in a case.
 - iii. Modifies the automatic stay under 362(a) by terminating the stay when the time for filing a plan has expired without a plan being filed. The Bill also eliminates the provision which currently allows a limited 30 day stay when a prior case was dismissed in the previous 1 year.
 - iv. The disallowance of claims where the creditor or its affiliate or agent or a direct or indirect transferor of the claim to the creditor, or an affiliate of such transferor engaged in inequitable conduct (including a violation of state or federal law) that harmed the debtor whether or not the conduct was connected with the claim or obligation that gave rise to the claim OR violated a Federal consumer financial law in connection with the claim or obligation. If the claim that was disallowed was determined to have been filed in bad faith (for example a claim where the applicable statute of limitations had expired) the estate can be awarded attorney’s fees and punitive damages.
 - v. Sets the debt limit to filing a Chapter 10 to a combined total of secured and unsecured debts of \$7,500,000.

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- vi. Increases the federal exemptions.
 - vii. Eliminates the reaffirmation provisions of section 524 and instead allows for a private right of action by the trustee, U.S. Trustee or bankruptcy administrator for a violation of a discharge injunction issued under a prior 7 or 13 and allows punitive damages of three times the amount the creditor sought to collect in violation of the injunction. The trustee who brought or joined in the matter can be awarded between 10% and 25% of the punitive damages.
 - viii. Allows for electronic signatures to be treated as original signatures
 - ix. Creates consumer bankruptcy ombuds within the CFPB to receive and resolve complaints from individual debtors. Provides the CFPB supervision and enforcement authority regarding bankruptcy law.
 - x. Makes certain amendments to the FDCPA to make it a violation to file a claim that is time barred and to attempt to collect a debt that was discharged and increases the additional damage amount from \$1000 to \$5000 and in a class action increases the maximum additional damages to the lesser of \$5,000,000 (currently \$500,000) or 5% (currently 1%) of the net worth of the debt collector
 - xi. Creates a searchable electronic bankruptcy lien filing system to allow trustees to file liens against the debtor under 1028(i)(1).
 - xii. Allows a debtor to operate a business as a debtor in possession.
- i. **Effective Date.** If a law is passed to incorporate some or all of the changes in the Bill the changes likely would not become effective until a year after any bill is signed into law. Also it is likely that any case commenced before such act's effective date would continue under the laws in effect at the time of the case filing as if the new law did not exist.

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