On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) was enacted. The CARES Act included several noteworthy changes to the Bankruptcy Code affecting both consumer and business cases. Most changes are scheduled to sunset in March of 2021. While the changes are temporary as written, the impact will likely be felt for a number of years. It is also possible that, as experience with these changes grows, some will become permanent.

Impact on Consumer Bankruptcies -

Chapter 7 Changes: In consumer bankruptcies before the CARES Act, to be eligible to file a Chapter 7, debtors were required to qualify through what is called a means test if their “current monthly income” exceeds the state median for the debtor’s household size. The CARES Act amended the definition of “current monthly income” under Section 101(10A)(B)(ii) to exclude any coronavirus-related payments from the federal government. This may expand the number of people eligible to file a Chapter 7 rather than being required to file a Chapter 13.

The coronavirus-related payments are Economic Impact Payments (“Payments”) authorized by the CARES Act. It is estimated that millions of Americans are eligible for the Payments. At present, eligible individuals with adjusted gross income up to $75,000 for single tax filers, $112,500 for head of household filers, and $150,000 for married couples filing jointly are eligible for the full $1,200 Payments for individuals and $2,400 for married couples filing jointly. In addition, they are eligible for an additional $500 per qualifying child. These amounts could change with future legislation.

“It is estimated that millions of Americans are eligible for the Payments.”

For filers with income above those amounts, the Payments are reduced by 5% of the adjusted gross income that exceeds the $75,000/$112,500/$150,000 thresholds. Single filers with income exceeding $99,000, $136,500 for head of household filers, and $198,000 for joint filers with no children are not eligible and will not receive Payments. While the Internal Revenue Service (IRS)
calculates and automatically sends the Payments to most eligible individuals, some may not yet have received Payments. Further, some may have to provide additional information to the IRS to get their Payments.

Some people will receive additional federal related payments in the form of enhanced unemployment supplements.iii Those payments are scheduled to end on July 31, 2020.

Chapter 13 Changes: The CARES Act also excludes coronavirus-related payments from the definition of “disposable income” under Bankruptcy Code section 1325(b)(2).iv This is an important change because to have a plan confirmed, a Chapter 13 debtor must either pay all creditors in full, or provide that all of the debtor’s projected “disposable income” be paid over the term of the plan. Excluding the federal government payments will potentially reduce the amounts that are required to be paid through a plan.

Relief is also available for individuals who are currently making payments in a confirmed Chapter 13 case. The CARES Act permits debtors to request modification of a plan under section 1329(d)(1)(A) if they are experiencing, or have experienced a material financial hardship due, directly or indirectly, to the COVID-19 pandemic.v Note that CARES does not define “material financial hardship” or the scope of an “indirect” hardship. This will be a decision left to the Courts.vi

“CARES included a provision to allow a debtor to extend the plan term of a chapter 13 plan up to 84 months from when the first payment was due under the confirmed plan.”

Under existing Bankruptcy Code provisions, a Chapter 13 plan could be no longer than 60 months. With reduced income and potentially increasing expenses during the COVID-19 pandemic, many consumer debtors lacked sufficient funds to make their scheduled payments and current living expenses. Forecasting when income would increase and how to make the sum of the required payments needed to complete a 60-month plan became more and more difficult. Recognizing these problems, the CARES Act included a provision to allow debtors to extend the term of a chapter 13 plan up to 84 months from when the first payment was due under a confirmed plan.vii This amendment sunsets one year from March 27, 2020.viii Chapter 13 debtors with plans confirmed before the effective date of CARES can seek to modify plans consistent with these provisions.ix

Impact on Business Bankruptcies -

Small Business Changes in Chapter 11: The Small Business Reorganization Act of 2019 was signed into law on August 23, 2019 and went into effect on February 19, 2020. This legislation added a provision known as Subchapter V to Chapter 11 of the Bankruptcy Code.x The CARES Act makes Chapter 11 more accessible and affordable for small businesses.

“The CARES Act makes Chapter 11 more accessible and affordable for small businesses.”

Subchapter V is designed to streamline the process for small business reorganizations in four of ways. First, it eliminates the requirement for a creditor committee.xi Second, it creates a trustee to
monitor the process, follow payments, and assist the debtor in negotiations with creditors to achieve a consensual plan.\textsuperscript{xii} Third, the traditional plan and disclosure statement are now combined into a single more streamlined document.\textsuperscript{xiii} This reduces the time and expense of preparing the documents and may make them more clearly understandable for creditors. Fourth, the approval of a plan is not subject to voting by creditors. Instead it requires approval from a judge if the plan is fair and equitable.\textsuperscript{xiv} These changes give owners greater control over the business.

In addition, only the debtor may file a plan.\textsuperscript{xv} Individual debtors who used home mortgages to finance their businesses have a right to modify those mortgages in a plan.\textsuperscript{xvi}

The benefits also come with some additional requirements. Various financial disclosures and reports are required during the process. In addition to the normal Section 341 meeting of creditors, the debtor must attend a debtor interview and a scheduling conference.\textsuperscript{xvii} And the debtor must allocate the disposable income of the business to repayment of creditors over three to five years. This can still be an advantage for a small business because debtors may retain ownership of the business even if the plan does not fully repay unsecured creditors.\textsuperscript{xviii} This means the “absolute priority” rule under other types of Chapter 11 does not apply under Subchapter V.

The CARES Act expanded the number of businesses that may qualify for Subchapter V. Under the Act, a business will qualify for Subchapter V if it has up to $7.5 million in non-contingent liquidated secured and unsecured debt.\textsuperscript{xix} This limit is effective through March 26, 2021 unless Congress extends the CARES Act dollar amount expansion. If the increased limit is not extended then after March 26, 2021 the debt ceiling will revert to $2,725,625.

**Chapter 7 Changes:** Most small businesses closed because of the COVID-19 pandemic. Many are unable to reopen. If a business does not qualify for Subchapter V and does not intend to try to reorganize in a traditional sense, there are still options for a small business. This is especially true for the sole proprietor.

The business can file a Chapter 7. A trustee is appointed to liquidate any assets and distribute the proceeds. This option may be more attractive to a sole proprietor because, although entities do not receive a discharge, sole proprietors can obtain discharge of debts. This extends to both business and personal debts thus reducing the overall debt burden faced by a sole proprietor. Additionally, if the sole proprietor is in a service-oriented business, the owner may even be able to keep the business open relying on their own labor while the trustee sells the non-exempt assets of the business.

**Additional Financial Options to Consider:** In addition to the changes discussed above, the CARES Act contains multiple programs that may provide small businesses access to financing during these turbulent times. Two of the main programs are the Paycheck Protection Program (the “PPP”)\textsuperscript{xx} and the Economic Injury Disaster Loan (the “EIDL”).\textsuperscript{xxi} These programs may provide important assistance to small and midmarket businesses. Each has specific qualification requirements and limits. For details, you should refer to the CARES Act and related agency regulations. As additional legislation is considered or adopted, there may be changes to these programs or other programs may be added.
The PPP has been subject to litigation throughout the country with respect to whether the Small Business Administration can deny an application to a debtor who is in bankruptcy, or to a business entity whose principal is in a bankruptcy case. To date, there is no clear decision on the issue.xxii

About the authors: Catherine J. Furay is the Chief United States Bankruptcy Judge for the Western District of Wisconsin. She is the Editor of Ginsberg & Martin on Bankruptcy and a frequent speaker on bankruptcy to state and national groups. She has served on the Board and various committees of the National Conference of Bankruptcy Judges. Reza Hajisanei served as a judicial law clerk for Judge Furay. He assisted in the preparation of supplements to Ginsberg & Martin. He will join Michael Best & Friedrich LLP in the fall as an Associate under the firm’s Banking & Financial Services Subgroup in its Madison Wisconsin office.

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i CARES Act § 1113. BANKRUPTCY.

ii CARES Act § 1113(b)(1)(A)(iii).

iii CARES Act § 2104(b)(1)(B).

iv CARES Act § 1113(b)(1)(B).

v CARES Act § 1113(b)(1)(C).

vi Plan modifications may only be approved after notice and a hearing. See 11 U.S.C. § 1329(d)(1)(B) added by CARES Act § 1113(b)(1)(C).


viii CARES Act § 1113(b)(2)(B).

ix CARES Act § 1113(b)(1)(D). Notably, a Chapter 13 plan modification must meet the same confirmation requirements under section 1325(a), as well as the requirements under sections 1322(a), 1322(b), and 1323(c). See 11 U.S.C. § 1329(d)(3).

x Pub. L. 116-54; H.R. 3311. See 11 U.S.C. §§ 1181-1195. The SBRA does not repeal the existing Bankruptcy Code provisions governing small business debtors in ordinary Chapter 11s. Small business debtors who do not elect to proceed under a Subchapter V case will need to adhere to the current provisions of Chapter 11 governing small business cases.


xii See 11 U.S.C. § 1183(a)-(c).


 xix CARES Act § 1113(a)(1).

 xx See CARES Act § 1102.

 xxi See CARES Act § 1110.

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