

Coronavirus (COVID-19): changes to US laws—CARES Act's Effect on Bankruptcy

This article discusses and analyses the bankruptcy provisions contained in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). On 27 March 2020, the President signed the CARES Act into law. The CARES Act is a stimulus package designed to address the impact of the novel coronavirus (COVID-19) on, among others, individuals, businesses, and hospitals. As part of this design, the CARES Act revises several sections of the Bankruptcy Code to afford relief to small business debtors and individuals that are coping with the coronavirus pandemic and its financial impact. These changes are effective immediately.

Change to definition of small business debtor

The CARES Act makes the small debtor Chapter 11 provisions accessible to a greater number of small businesses. Under the CARES Act, a debtor with aggregate debts up to US\$7,500,000 can qualify as a small business debtor—up from US\$2,725,625. This amendment applies to all cases filed on or after the enactment of the CARES Act and lasts for one year.

The CARES Act accomplishes this by revising sections 103(i) and 1182 of the Bankruptcy Code. Pre-CARES Act, s 1182 (enacted as part of the Small Business Reorganization Act of 2019) defined the term 'debtor' as a 'small business debtor'. Bankruptcy Code, s 101(51D) contains the definition and requirements for a debtor to qualify as a small business debtor, including, that the debtor's aggregated debts (the total non-contingent, liquidated secured, and unsecured debts) not exceed US\$2,725,625. Pursuant to the CARES Act, s 1182 is revised to incorporate Bankruptcy Code, s 101(51D)'s definition of small business debtor for debtors except that the US\$2,725,625 is increased to US\$7,500,000. Bankruptcy Code, s 103(i) was also revised to provide that Sub-chapter V of Chapter 11 only applies to a debtor as defined in s 1182 (as opposed to using the definition of small business debtor under Bankruptcy Code, s 101(51D)).

After this amendment expires in one year, the definition of 'debtor' contained in Bankruptcy Code, s 1182 will revert back to the pre-CARES Act definition; ie Bankruptcy Code, s 1182 will again provide that the term 'debtor' means a small business debtor. Put another way, Bankruptcy Code, s 1182 will again use the definition specified in Bankruptcy Code, s 101(51D). Note that the CARES Act also made a technical correction to the definition of small business debtor under Bankruptcy Code, s 101(51D).

Current monthly income

The CARES Act revises the definition of current monthly income under Bankruptcy Code, s 101(10A). The current monthly income is used as part of the means test calculation which identifies Chapter 7 individual debtors who can repay some of their debts and forces them into Chapter 13 if they want to obtain a discharge of their debts (11 U.S.C. § 727(b)). The current monthly income is also used to determine and calculate the debts that a Chapter 13 debtor is required to repay under a Chapter 13 plan (11 U.S.C. § 1322(d)).

There are certain exclusions that apply to the current monthly income calculation, such as social security benefits. These exclusions remove these items from the calculation of the current monthly income. The CARES Act adds 'payments made under federal law relating to the national emergency declared by the President under the National Emergencies Act' with respect to coronavirus to the exclusions from the definition of current monthly income. Thus, the CARES Act provides relief for Chapter 7 and 13 debtors by removing the federal government's coronavirus related payments from the current monthly income calculation. This amendment applies to all cases filed on, before, or after the enactment of the CARES Act and lasts for one year.

Changes to Chapter 13

The CARES Act also revises the definition of disposable income under Bankruptcy Code, s 1325(b)(2). Section 1325 sets forth the requirements that must be satisfied for a court to confirm a proposed Chapter 13 re-

organisation plan. Bankruptcy Code, s 1325(b)(2) contains the definition of disposable income for Chapter 13 cases. To determine the amount of the debtor's disposable income, the debtor uses his or her current monthly income as the initial starting point (11 U.S.C. § 1325(b)(2)). Bankruptcy Code, s 1325(b)(2) contains certain exclusions to the disposable income calculation, such as child support payments. The CARES Act adds 'payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act' with respect to coronavirus to the exclusions from the definition of disposable income. This is consistent with the revised definition of current monthly income under Bankruptcy Code, s 101(10A). This amendment applies to all cases filed on, before, or after the enactment of the CARES Act and lasts for one year.

The CARES Act also revises the criteria for modifying a Chapter 13 plan under Bankruptcy Code, s 1329. Under Bankruptcy Code, s 1329(a), the debtor, trustee, or unsecured creditor may modify a Chapter 13 plan after confirmation to (1) increase or reduce the plan payments, (2) increase or reduce the timing of plan payments, (3) alter the distribution to a creditor under the plan, or (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance 11 U.S.C. § 1329. The CARES Act adds subsection (d) which provides that the debtor can modify a Chapter 13 plan after confirmation if 'the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease'. The CARES Act further provides that the modification can include extending the repayment period for up to seven years after the first payment under the original confirmed plan was due. This amendment applies to parties that confirmed their Chapter 13 plan prior to the enactment of the CARES Act and lasts for one year.