

National Conference of Bankruptcy Judges

Behind the Bench

REPRESENTING ACTIVE MILITARY & MILITARY VETERANS ON BANKRUPTCY AND DEBTOR-CREDITOR RELATED ISSUES¹

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¹ This issue list was compiled for educational purposes and is based on knowledge gained and information collected from both ABI's Task Force on Veterans and Servicemembers Affairs (the Task Force) as well as other outside military and veteran available resources. The Task Force's Pro Bono and Education Subcommittees continue to develop comprehensive materials and resources for attorney and financial advisor volunteers and clients who are willing to provide pro bono assistance to active military members and veterans.

Legal Disclaimer: Any person using these resources does so without any reliance on the information provided by the speakers on this panel. Participants are encouraged to exercise independent diligence in making decisions with respect to their clients.

1. Bankruptcy is Unsurprisingly Generally Not Part of the Military Culture. Bankruptcy and financial distress are not generally understood or discussed within the military. Yet, like any demographic, servicemembers and military veterans may need assistance with financial issues and in seeking remedies for financial distress including bankruptcy remedy at some point in their lives. The Task Force has used several means to address this issue including working on legislative matters affecting military and veterans such as the HAVEN Act (excluding most disability pay from the means test) and the extension of the National Guard and Reservists Debt Relief Act of 2008 (which provides a 540 day safe harbor from the means test income for active duty income as well as income of Armed Forces reservists and National Guard members called to active duty or for performing homeland defense activity),² providing bankruptcy specific information to help train JAG officers, connecting volunteers with expertise in financial distress to the ABA LAMP Program to meet the needs of active service members, expanding the reach of pro bono services available to include debtor-creditor and bankruptcy issues in various jurisdictions and presenting programs at military stand down programs and other similar programs. The Task Force also has been active in preparing military specific financial literacy and bankruptcy specific information for dissemination on its website, through various organizations including the American Legion, certain Native American organizations, and the Warrior Scholar Project.³ Most recently, the Task Force has been working towards helping to identify financial advisor mentors for participants in the VETRN Programs on starting and running veteran owned businesses.⁴
2. Retention or Acquisition of Security Clearances May be a Major Concern. Both military and veteran clients may be worried about their current or future ability to obtain a security clearance in connection with any debtor related creditor issues including bankruptcy. The availability of security clearances may be an important part of an active military serviceman or woman's career in terms of advancement. Additionally, many veterans after leaving the military gravitate to jobs in security and other similar sectors such as government contractor positions which may require security clearances. Bankruptcy is not a *per se* disqualifying factor for security clearances by the DoD because clearances are evaluated using thirteen different factors including several factors and conditions that could mitigate such

² See Verstanding, Maurice, "Soldiers and Recent Veterans May Soon Be Subject to the Means Test, ABI Journal Vol. XLII, No. 11, November 2023.

³ Warrior-Scholar Project programs empower enlisted student veterans and transitioning service members to succeed in higher education and beyond with their alumni. See <https://www.warrior-scholar.org/our-programs/>.

⁴ For more information on VETRN and their ongoing programs see <https://vetrn.org/>.

factors that are relevant. See: Code of Federal Regulations, 32 C.F.R. 154, App. H (2012) (updating and codifying the guidelines attached to DoD Directive 5220.6) & Guideline F. It is important to understand and be prepared to address these factors as part of addressing a servicemember or veteran's financial issues including the bankruptcy planning process. For example, the inability or unwillingness to satisfy debts, evidence of a history of not meeting financial obligations, failure to file tax returns and consistent spending beyond means are among the factors used to evaluate security clearances. These factors may be mitigated by the passage of time, the fact that the financial problems were largely caused by factors beyond the client's control, and evidence of responsible action taken in connection with such financial difficulties, including proof of good faith efforts to repay creditors and otherwise resolve debts the receipt of counseling and other clear indications that the problem is controlled and resolved. For more detailed information, See Emily Connor Kennedy, "Discharges and the DoD: The Interplay between Bankruptcy & Security Clearances," ConsiderChapter13.org, March 6, 2022 (found in NACTT Academy).

3. 3. Servicemembers Get Moved Regularly and Sometimes Are Deployed for Active Duty. Because these factors may affect financial resources, certain bankruptcy claims, rights against third parties, budgets, timing and availability of resources and remedies and other financial issues, availability for court appearances and preparation for defending court matters, it is a good idea to ask any active military clients questions about periods of prior deployment, periods of service and types of service as well as known upcoming moves and deployments. For example, verified, active deployment which makes a servicemember unavailable for appearance appears to be grounds for waiving the requirement that a debtor appear and testify at a Section 341 Meeting. See e.g., Memorandum from Region 7 United States Trustee dated April 7, 2003, Richard W. Simmons, U.S. Trustee Region 7 to trustees in Southern and Western District of Texas which states that: "The Executive Office of the United States Trustee has concluded that as a "matter of the Program Policy, United States Trustees should excuse unavailable Active Duty Servicemembers from attendance at the 341 meeting in appropriate circumstances."⁵
4. 4. Servicemembers' Residence May Be Different From their Domicile Making Filing Potentially Available in More Than One Judicial District. The debtor's residence is where the debtor lives as of the date of the filing. The debtor's domicile is a permanent place of residence where the debtor intends to return following a temporary departure. A debtor may file in any judicial district where they have their

⁵ This memo was issued after 9-11 and the commencement of the war in Iraq. There is no reason to believe that the policy has changed since that time. It appears that regional U.S. Trustee's drive policy in this area in specific cases. The U.S. Trustee's office hopefully will be sympathetic to an active servicemember's situation and adjust the regional requirements accordingly.

domicile, residence, or principal assets within the 180 days prior to bankruptcy, or the longest portion of such period, as applicable. It's not uncommon for military servicemembers to have different places of domicile and residence while on active duty and for some period after leaving the service. There could also be more than one residence or domicile for such clients based on their prior moves and change in plans. Based on the facts, counsel should give some thought to the best venue for the bankruptcy cases, where applicable. See *also* #5 below regarding issues related to applicable exemptions.

5. Exemption Choice Is Made According to a Debtor's Domicile, Not Residence. The choice of which state's exemptions apply is based on domicile not residence. As noted above, a servicemember may have more than one domicile. Section 522(b)(3)(A) provides that a debtor that has more than one domicile in the 730 days prior to filing for bankruptcy, the applicable state exemptions will be for the state where the debtor's domicile was located for the 180 days prior to the petition date or the longer portion of such 180-day period, as applicable. Depending on the facts there may be timing and other issues which could affect a debtor's available exemptions. One issue that may come up is the availability under the applicable state exemptions of exempting property located in another state as this may be a common fact pattern existing for military families that have moved. In sum, the debtor's counsel should both understand the facts and fully analyze the possible exemption issues that could arise for their servicemember clients. For a much more thorough discussion of these issues, See attached article, Louis M. Bubala III and Joseph E. Dagher, "*Homestead Exemptions for Military Members on Assignment*," 34 ABI Journal, p. 34-36.
6. Understanding Your Client's Military and Disability Pay is Important to Chapter Choice and Other Bankruptcy Issues. The Haven Act dramatically impacted the scope of COMI for many veterans and servicemembers (and in some circumstances the COMI of their family members) by excluding from COMI "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.**" Section 101(10A). It is important for you to understand the nature and scope of your military or veteran client's income by accessing the DOD & VA's eBenefits website for award letters, payment history and military discharge documents and other records at www.ebenfits.va.gov. See *also* DFA's MyPay website for leave and earnings statements www.mypay.dfas.mil.

7. Be Aware of Those Obscure Exceptions to Discharge That Might be Lurking at the Back of Section 523. It is important to review specific debts owed to the government including the obligation to repay overpayments of military benefits to determine the scope of your client's discharge. There are certain obscure and infrequently encountered exceptions to the discharge that otherwise may be overlooked. See e.g., In re Fagan, 559 B.R. 718 (Bankr. E.D. CA. 2016).
8. There Are Special Protections Provided to Active Military and Veterans on Collection Activity Including SCRA that may affect Claims Asserted in a Bankruptcy Case. There are many protections including the Servicemembers Civil Relief Act (SCRA) which may be available to your servicemember clients (including reservists and inductees) and in some instances their families where the servicemember has been called to duty. Counsel needs to understand how these protections could impact the allowability of certain claims filed in the bankruptcy case, the validity of default judgments obtained prior to bankruptcy, as well as your client's rights in relation to pending litigation in both the bankruptcy court as well as non-bankruptcy courts. Some remedies are self-executing while other remedies must be affirmatively sought to protect your client's rights. The ABI Task Force website includes a comprehensive article by former bankruptcy judge Robert E. Gerber that provides a good summary of the SCRA's provisions: Robert E. Gerber, "Protections Afforded by the Servicemembers Civil Relief Act." Additionally, agencies such as the VA may adjust collection actions on VA Mortgages. For example, it was recently announced that the VA ordered a six-month halt on foreclosures of homes with VA Loans through May of 2024 based on issues arising in connection with COVID-19 moratoria on payments.
9. Unique Resources Available to Military, Veterans, Dependents, and Survivors Which May Help Your Client to Improve Their Financial Difficulties. Your clients may have access to resources unique to either active military and/or veterans which may impact your decisions on the best remedies to address their debtor-creditor issues. The nature and extent of these resources may depend on the client's military or dependent status, career history, character of discharge from service (i.e., Honorable, Other Than Honorable, Dishonorable), and disability claim status. The available resources for veterans and servicemembers unfortunately are extensive, balkanized and dispersed in many locations which makes them difficult to locate particularly because different locales may have different levels and types of resources. Finding *credible* resources^[1] that regularly work with military members, veterans, dependents, and survivors can assist you in getting your clients the help they need to address issues they are facing and perhaps

^[1] Just because it has military in the name doesn't mean that it is legitimate. There are several scams, and some organizations prey on military comrades and target active military, veterans, and their families particularly, in the employment areas.

avoid bankruptcy. There are many resources and benefits currently available and listed on the Veteran's Affairs Department and Department of Defense websites such as www.va.gov, within local bar associations, or law school legal clinics. You can search for National Law Schools with veterans' clinics here: <https://nlsvcc.org/members-list/>. Another powerful and centralized individual resource is your local accredited VA Veterans Service Officer who help with benefit eligibility and claims processes. You can search for a VSO in your area by zip code here: <https://www.va.gov/ogc/apps/accreditation/index.asp>. Additionally, certain information unique to military and veterans' issues is regularly posted on the Task Force's section of the ABI Website. See <https://veterans.abi.org>. See also <https://veterans.abi.org/faq> (frequently asked questions oriented to the client). For more information on the Task Force's projects or volunteer opportunities please contact the Co-Chairs of the Task Force:

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