2023 Annual Spring Meeting

Legislative Update

Sponsored by Okin Adams Bartlett Curry LLP

Amy A. Quackenboss, Moderator
American Bankruptcy Institute; Alexandria, Va.

Robert J. Keach
Bernstein Shur; Portland, Maine

Prof. Robert M. Lawless
University of Illinois College of Law; Champaign, Ill.

Jack D. Solano
U.S. Senate Committee on the Judiciary; Washington, D.C.

II

117TH CONGRESS
1ST SESSION

S. 2598

To amend title 11, United States Code, to improve the treatment of student loans in bankruptcy, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 4, 2021

Mr. DURBIN (for himself and Mr. CORNYN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 11, United States Code, to improve the treatment of student loans in bankruptcy, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘‘Fostering Responsible Education Starts with Helping Students Through Accountability, Relief, and Taxpayer Protection Through Bankruptcy Act of 2021’’ or the ‘‘FRESH START Through Bankruptcy Act’’.

SEC. 2. EXCEPTIONS TO DISCHARGE.

Section 523(a) of title 11, United States code, is amended by striking paragraph (8) and inserting the following:

"(8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend received from a governmental unit or nonprofit institution, unless—

"(A) excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents; or

"(B) the first payment on such debt became due before the 10-year period (exclusive of any applicable suspension of the repayment period) ending on the date of the filing of the petition;

"(8A) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

"(A) an obligation to repay funds received as an educational benefit, scholarship, or stipend, other than an obligation described in paragraph (8); or

"(B) any educational loan, other than a loan described in paragraph (8), that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;".

SEC. 3. EFFECT OF DISCHARGE OF CERTAIN STUDENT LOANS.

Section 524 of title 11, United States Code, is amended by adding at the end the following:

"(n)(1) In this subsection:

"(A) The term 'cohort repayment rate', with respect to a covered institution of higher education, means the percentage of student borrowers who are making at least some progress paying down their student loans within 3 years of entering repayment.

"(B) The term 'covered institution of higher education' means an institution of higher education (as defined in section 102 of the Higher Education Act of 1965 (20 U.SC. 1002)) that—

"(i) is a participant in the Federal Direct Loan Program under part D of title IV of the Higher Education Act of 1965 (20 U.S.C. 1087a et seq.); and

"(ii) has an enrollment of students that is not less than 33 percent students who have received a loan made, insured, or guaranteed under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.)).

"(C) The term 'covered student loan' means the original principal of a loan—

"(i) the first payment on which became due before the 10-year period (exclusive of any applicable suspension of the repayment period) ending on the date of the filing of the petition; and

"(ii) used by the debtor to make a payment to a covered institution of higher education on behalf of the debtor for the purpose of attaining an educational benefit.

"(D) The term 'Federal Direct PLUS Loan' means a Federal Direct PLUS Loan under part D of title IV of the Higher Education Act of 1965 (20 U.S.C. 1087a et seq.)

"(2) If a covered student loan is discharged in a bankruptcy case under this title, the covered institution of higher education to which the debtor of the bankruptcy case made a payment with the covered student loan shall pay to the Department of Education an amount determined in accordance with the following:

"(A) An amount equal to 50 percent of the amount of the covered student loan that is discharged, if the covered institution of higher education, on the date on which the first payment on the covered student loan became due—

"(i) had a cohort default rate (as determined under section 435(m) of the Higher Education Act of 1965 (20 U.S.C. 1085(m)) for each of the 3 fiscal years preceding that date that was equal to or more than 25 percent; and

"(ii) had a cohort repayment rate—

"(I) except for borrowers described in subclause (II), that was equal to or less than 20 percent; and

"(II) with respect to borrowers who were graduate or professional students who received a Federal Direct PLUS Loan for enrollment at the institution, that was equal to or less than 35 percent.

"(B) An amount equal to 30 percent of the amount of the covered student loan that is discharged, if the covered institution of higher education, on the date on which the first payment on the covered student loan became due—

"(i) had a cohort default rate (as determined under section 435(m) of the Higher Education Act of 1965 (20 U.S.C. 1085(m)) for each of the 3 fiscal years preceding that date that was equal to or more than 20 percent and less than 25 percent; and

"(ii) had a cohort repayment rate—

"(I) except for borrowers described in subclause (II), that was equal to or less than 25 percent and more than 20 percent; and

"(II) with respect to borrowers who were graduate or professional students who received a Federal Direct PLUS Loan for enrollment at the institution, that was equal to or less than 40 percent and more than 35 percent.

"(C) An amount equal to 20 percent of the amount of the covered student loan that is discharged, if the covered institution of higher education, on the date on which the first payment on the covered student loan became due—

"(i) had a cohort default rate (as determined under section 435(m) of the Higher Education Act of 1965 (20 U.S.C. 1085(m)) for each of the 3 fiscal years preceding that date that was equal to or more than 15 percent and less than 20 percent; and

"(ii) had a cohort repayment rate—

"(I) except for borrowers described in subclause (II), that was equal to or less than 30 percent and more than 25 percent; and

"(II) with respect to borrowers who were graduate or professional students who received a Federal Direct PLUS Loan for enrollment at the institution, that was equal to or less than 45 percent and more than 40 percent.".

SEC. 4. EFFECTIVE DATE; APPLICABILITY.

This Act and the amendments made by this Act shall—

(1) take effect on the date that is 180 days after the date of enactment of this Act; and

(2) apply to a petition filed or amended under this title on or after the effective date under paragraph (1) with respect to a debt for an educational benefit, overpayment, loan, scholarship, or stipend of a debtor.

Public Law 117–324
117th Congress

An Act

To prevent organizational conflicts of interest in Federal acquisition, and for other purposes.

Dec. 27, 2022
[S. 3905]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Preventing Organizational Conflicts of Interest in Federal Acquisition Act. 41 USC 2303 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Preventing Organizational Conflicts of Interest in Federal Acquisition Act".

SEC. 2. PREVENTING ORGANIZATIONAL CONFLICTS OF INTEREST IN FEDERAL ACQUISITION.

Deadline.

(a) IN GENERAL.—Not later than 18 months after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall revise the Federal Acquisition Regulation—

Updates.

(1) to provide and update—

(A) definitions related to specific types of organizational conflicts of interest, including unequal access to information, impaired objectivity, and biased ground rules;

(B) definitions, guidance, and illustrative examples related to relationships of contractors with public, private, domestic, and foreign entities that may cause contract support to be subject to potential organizational conflicts of interest, including undue influence; and

(C) illustrative examples of situations related to the potential organizational conflicts of interest identified under this paragraph, including an example of the awarding by a Federal regulatory agency of a contract for consulting services to a contractor if employees of the contractor performing work under such contract are permitted by the contractor to simultaneously perform work under a contract for a private sector client under the regulatory purview of such agency;

(2) to provide executive agencies with solicitation provisions and contract clauses to avoid or mitigate organizational conflicts of interest, for agency use as needed, that require contractors to disclose information relevant to potential organizational conflicts of interest and limit future contracting with respect to potential conflicts of interest with the work to be performed under awarded contracts;

(3) to allow executive agencies to tailor such solicitation provisions and contract clauses as necessary to address risks associated with conflicts of interest and other considerations that may be unique to the executive agency;

Requirements. Procedures.

(4) to require executive agencies—

(A) to establish or update as needed agency conflict of interest procedures to implement the revisions to the Federal Acquisition Regulation made under this section; and

(B) to periodically assess and update such procedures as needed to address agency-specific conflict of interest issues; and

Update. Procedures.

(5) to update the procedures set forth in section 9.506 of the Federal Acquisition Regulation to permit contracting officers to take into consideration professional standards and procedures to prevent organizational conflicts of interest to which an offeror or contractor is subject.

(b) EXECUTIVE AGENCY DEFINED.—In this section, the term “executive agency” has the meaning given the term in section 133 of title 41, United States Code.

Approved December 27, 2022.

LEGISLATIVE HISTORY—S. 3905:

CONGRESSIONAL RECORD, Vol. 168 (2022):
Aug. 1, considered and passed Senate.
Dec. 14, considered and passed House.

II

117TH CONGRESS
1ST SESSION

S. 2497

To amend title 11, United States Code, to prohibit nonconsensual release of a nondebtor entity's liability to an entity other than the debtor, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 28, 2021

Ms. WARREN (for herself, Mr. DURBIN, and Mr. BLUMENTHAL) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 11, United States Code, to prohibit nonconsensual release of a nondebtor entity's liability to an entity other than the debtor, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Nondebtor Release Prohibition Act of 2021''.

SEC. 2. PROHIBITION OF NONDEBTOR RELEASES.

(a) IN GENERAL.—Chapter 1 of title 11, United States Code, is amended by adding at the end the following:

"§ 113. Prohibition of nondebtor releases

''(a) Except as provided in subsection (b) of this section, subsections (a)(3), (g), (h), or (i) of section 524, section 1201, and section 1301, the court may not—

''(1) with respect to the liability of an entity other than the debtor or the estate on, or the liability of property of an entity other than the debtor or the estate for, a claim or cause of action of an entity other than the debtor or the estate—

''(A) approve any provision, in a plan of reorganization or otherwise, for the discharge, release, termination, or modification of such liability; or

''(B) order the discharge, release, termination, or modification of such liability; or

''(2) with respect to a claim or cause of action of an entity other than the debtor or the estate against an entity other than the debtor or the estate, or against property of an entity other than the debtor or the estate, enjoin—

''(A) the commencement or continuation (including the issuance or employment of process) of a judicial, administrative, or other action or proceeding to assert, assess, collect, recover, offset, recoup, or otherwise enforce such claim or cause of action; or

"(B) any act to assert, assess, collect, recover, offset, recoup, or otherwise enforce such claim or cause of action.

"(b) Nothing in subsection (a) of this section shall affect any power the court may have—

"(1) to authorize a sale, transfer, or other disposition of property free and clear of claims or interests;

"(2) to prevent an entity other than the debtor or the estate from exercising control over or otherwise interfering with a right or interest (including a claim or cause of action) that is property of the estate;

"(3) to bar a claim or cause of action for indemnity, reimbursement, contribution, or subrogation against an entity that the estate has released from a claim or cause of action for which the holder of the barred claim or cause of action also is or may be liable or has or may have secured;

"(4) under applicable nonbankruptcy law, title 28, or the Federal Rules of Bankruptcy Procedure, with respect to any claim or cause of action the court is hearing under section 157(a) or 1334(b) of title 28;

"(5) to approve any disposition of a claim or cause of action of an entity other than the debtor or the estate to which such entity expressly consents in a signed writing provided that—

"(A) such consent is given only after clear and conspicuous notice to such entity of the proposed disposition in language appropriate for the typical holder of such claim or cause of action;

"(B) such consent cannot be given by—

"(i) accepting a proposed plan; or

"(ii) failing to accept or reject a proposed plan, failing to object to a proposed plan, or any other silence or inaction; and

"(C) treatment of such entity, and any claims or interests of such entity, under a plan cannot be more or less favorable by reason of such entity's consent or failure to consent; or

"(6) to enjoin the commencement or continuation (including the issuance or employment of process) of a judicial, administrative, or other action or proceeding against an entity appointed or employed (or whose appointment or employment was approved) by or under the auspices of the court, in another court and without leave of the court, with respect to acts or omissions for which the entity was so appointed or employed.

"(c) In a case under chapter 11 of this title, no order or decree temporarily staying or enjoining, pursuant to this title, the commencement or continuation (including the issuance or employment of process) of a judicial, administrative, or other action or proceeding to assert, assess, collect, recover, offset, recoup, or otherwise enforce a claim or cause of action against an entity other than the debtor or the estate against an entity other than the debtor or the estate, or against property of an entity other than the debtor or the estate, shall extend (or be extended) beyond 90 days after the date of the order for relief without the express consent of the entity whose claim or cause of action is stayed or enjoined.

"(d) Nothing in subsection (b) or (c) shall be construed to authorize relief within the scope of subsection (b) or (c).".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 1 of title 11, United States Code, is amended by adding at the end the following:

"113. Prohibition of nondebtor releases.".

SEC. 3. APPEAL OF NONDEBTOR STAYS.

Section 158 of title 28, United States Code, is amended—

(1) in subsection (a), by striking ''The'' and inserting ''Except as provided in subsection (d)(3), the''; and

(2) by inserting after subsection (d)(2) the following:

''(3)(A) The appropriate court of appeals shall have jurisdiction of appeals from all orders and decrees (whether interlocutory or final) temporarily staying or enjoining (or increasing the duration of any temporary stay or injunction of) the commencement or continuation (including the issuance or employment of process) of a judicial, administrative, or other action or proceeding to assert, assess, collect, recover, offset, recoup, or otherwise enforce a claim or cause of action of an entity other than the debtor or the estate against an entity other than the debtor or the estate, or against property of an entity other than the debtor or the estate, entered in a case under chapter 11 of title 11 by—

''(i) a bankruptcy judge under section 157 of this title; or

''(ii) a district court under section 1334 of this title.

''(B) If an appeal is taken under subparagraph (A), the stay order or decree shall immediately terminate and dissolve and be of no further force or effect 90 days after its issuance by the bankruptcy judge or district court, unless the appeal is dismissed or the court of appeals affirms the stay order or decree before that date.''.

SEC. 4. DIVISIONAL MERGERS.

Section 1112 of title 11, United States Code, is amended—

(1) by redesignating subsection (f) as subsection (g); and

(2) by inserting after subsection (e) the following:

''(f) On a request of a party in interest, and after notice and a hearing, the court shall dismiss a case under this chapter if the debtor or a predecessor of the debtor was the subject of, or was formed or organized in connection with a divisional merger or equivalent transaction or restructuring that—

''(1) had the intent or foreseeable effect of—

''(A) separating material assets from material liabilities of an entity eligible to be a debtor under this title; and

''(B) assigning or allocating all or a substantial portion of those liabilities to the debtor, or the debtor assuming or retaining all or a substantial portion of those liabilities; and

"(2) occurred during the 10-year period preceding the date of the filing of the petition.".

SEC. 5. RULE OF CONSTRUCTION.

Nothing in this Act, or the amendments made by this Act, shall be construed to independently grant the court authority to issue nondebtor releases, injunctions, or stays in connection with an order for relief under chapter 11 of title 11, United States Code, or in connection with an order confirming a plan of reorganization, nor shall anything in this Act or such amendments be construed to imply that any other provision of title 11 of such Code or of nonbankruptcy law grants such authority.

SEC. 6. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to any case under title 11, United States Code, that is—

(1) pending in bankruptcy as of the date of the enactment of this Act; or

(2) filed or reopened on or after the date of the enactment of this Act.

(b) VALIDITY OF FINAL ORDERS.—Nothing in this Act, or the amendments made by this Act, shall affect the validity of any final judgment, order, or decree as applied under section 158 of title 28, United States Code, entered before the date of the enactment of this Act.

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118TH CONGRESS
1ST SESSION

H. R. 1017

To amend title 28, United States Code, to modify venue requirements relating to bankruptcy proceedings.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 14, 2023

Ms. LOFGREN (for herself and Mr. BUCK) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to modify venue requirements relating to bankruptcy proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Bankruptcy Venue Reform Act''.

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress finds that—

(1) bankruptcy law provides a number of venue options for filing bankruptcy under chapter 11 of

title 11, United States Code, including, with respect to the entity filing bankruptcy—

(A) any district in which the place of incorporation of the entity is located;

(B) any district in which the principal place of business or principal assets of the entity are located; and

(C) any district in which an affiliate of the entity has filed a pending case under title 11, United States Code;

(2) the wide range of permissible bankruptcy venue options has led to an increase in companies filing for bankruptcy outside of their home States—the district in which the principal place of business or principal assets of the company is located;

(3) the practice described in paragraph (2) is known as ‘‘forum shopping’’;

(4) forum shopping has resulted in a concentration of bankruptcy cases in a limited number of districts;

(5) forum shopping—

(A) prevents small businesses, employees, retirees, creditors, and other important stakeholders from fully participating in bankruptcy cases that have tremendous impacts on their lives, communities, and local economies; and

(B) deprives district courts of the United States of the opportunity to contribute to the development of bankruptcy law in the jurisdictions of those district courts; and

(6) reducing forum shopping in the bankruptcy system will strengthen the integrity of, and build public confidence and ensure fairness in, the bankruptcy system.

(b) PURPOSE.—The purpose of this Act is to prevent the practice of forum shopping in cases filed under chapter 11 of title 11, United States Code.

SEC. 3. VENUE OF CASES UNDER TITLE 11.

Title 28, United States Code, is amended—

(1) by striking section 1408 and inserting the following:

"§ 1408. Venue of cases under title 11

"(a) PRINCIPAL PLACE OF BUSINESS WITH RESPECT TO CERTAIN ENTITIES.—

"(1) IN GENERAL.—Except as provided in paragraph (2), for the purposes of this section, if an entity is subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange clause 1934 (15 U.S.C. 78m, 78o(d)), the term 'principal place of business', with respect to the entity, means the address of the principal executive office of the entity as stated in the last annual report filed under that Act before the commencement of a case under title 11 of which the entity is the subject.

"(2) EXCEPTION.—With respect to an entity described in paragraph (1), the definition of the 'principal place of business' under that paragraph shall apply for purposes of this section unless another address is shown to be the principal place of business of the entity by clear and convincing evidence.

"(b) VENUE.—Except as provided in section 1410, a case under title 11 may be commenced only in the district court for the district—

"(1) in which the domicile, residence, or principal assets in the United States of an individual who is the subject of the case have been located—

"(A) for the 180 days immediately preceding such commencement; or

"(B) for a longer portion of the 180-day period immediately preceding such commencement than the domicile, residence, or principal assets in the United States of the individual were located in any other district;

"(2) in which the principal place of business or principal assets in the United States of an entity, other than an individual, that is the subject of the case have been located—

"(A) for the 180 days immediately preceding such commencement; or

"(B) for a longer portion of the 180-day period immediately preceding such commencement than the principal place of business or principal assets in the United States of the entity were located in any other district; or

"(3) in which there is pending a case under title 11 concerning an affiliate that directly or indirectly owns, controls, or holds 50 percent or more of the outstanding voting securities of, or is the general partner of, the entity that is the subject of the later filed case, but only if the pending case was properly filed in that district in accordance with this section.

"(c) LIMITATIONS.—

"(1) IN GENERAL.—For the purposes of paragraphs (2) and (3) of subsection (b), no effect shall be given to a change in the ownership or control of an entity that is the subject of the case, or of an affiliate of the entity, or to a transfer of the principal place of business or principal assets in the United

States of an entity that is the subject of the case, or of an affiliate of the person entity, to another district, that takes place—

"(A) within 1 year before the date on which the case is commenced; or

"(B) for the purpose of establishing venue.

"(2) PRINCIPAL ASSETS.—

"(A) PRINCIPAL ASSETS OF AN ENTITY OTHER THAN AN INDIVIDUAL.—For the purposes of subsection (b)(2) and paragraph (1) of this subsection—

"(i) the term 'principal assets' does not include cash or cash equivalents; and

"(ii) any equity interest in an affiliate is located in the district in which the holder of the equity interest has its principal place of business in the United States, as determined in accordance with subsection (b)(2).

"(B) EQUITY INTERESTS OF INDIVIDUALS.—For the purposes of subsection (b)(1), if the holder of any equity interest in an affiliate is an individual, the equity interest is located in the district in which the domicile or residence in the United States of the holder of the equity interest is located, as determined in accordance with subsection (b)(1).

"(d) BURDEN.—On any objection to, or request to change, venue under paragraph (2) or (3) of subsection (b) of a case under title 11, the entity that commences the case shall bear the burden of establishing by clear and convincing evidence that venue is proper under this section.

"(e) OUT-OF-STATE ADMISSION FOR GOVERNMENT ATTORNEYS.—The Supreme Court shall prescribe rules, in accordance with section 2075, for cases or proceedings arising under title 11, or arising in or related to cases under title 11, to allow any attorney representing a governmental unit to be permitted to appear on behalf of the governmental unit and intervene without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel."; and

(2) by striking section 1412 and inserting the following:

"§ 1412. Change of venue

"(a) IN GENERAL.—Notwithstanding that a case or proceeding under title 11, or arising in or related to a case under title 11, is filed in the correct division or district, a district court may transfer the case or proceeding to a district court for another district or division—

"(1) in the interest of justice; or

"(2) for the convenience of the parties.

"(b) INCORRECTLY FILED CASES OR PROCEEDINGS.—If a case or proceeding under title 11, or arising in or related to a case under title 11, is filed in a division or district that is improper under section 1408(b), the district court shall—

"(1) immediately dismiss the case or proceeding; or

"(2) if it is in the interest of justice, immediately transfer the case or proceeding to any district court for any district or division in which the case or proceeding could have been brought.

"(c) OBJECTIONS AND REQUESTS RELATING TO CHANGES IN VENUE.—Not later than 14 days after the filing of an objection to, or a request to change, venue of a case or proceeding under title 11, or arising in or related to a case under title 11, the court shall enter an order granting or denying the objection or request.".

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AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

II

118TH CONGRESS
1ST SESSION

S. 922

To amend PROMESA to include certain ethics provisions to provide for the disqualification of certain advisors to the Financial Oversight and Management Board, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 22, 2023

Mr. RUBIO (for himself and Mr. SCOTT of Florida) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

A BILL

To amend PROMESA to include certain ethics provisions to provide for the disqualification of certain advisors to the Financial Oversight and Management Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Financial Oversight and Management Board Integrity Act of 2023''.

SEC. 2. DISQUALIFICATION OF CERTAIN ADVISORS TO THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD.

Section 109 of PROMESA (48 U.S.C. 2129) is amended by adding at the end the following:

''(c) DISQUALIFICATION OF CERTAIN ADVISORS.—

''(1) DEFINITION OF COVERED CONTRACT.—In this subsection, the term 'covered contract' means a contract with the territorial government or an instrumentality of the territorial government, the performance of which is within the jurisdiction of the Oversight Board under section 204(b).

''(2) DISQUALIFICATION.—In accordance with the rules adopted by the Oversight Board under paragraph (3), any third-party advisory or consulting firm shall be disqualified from advising the Oversight Board for the duration of any period during which the firm has as a client, or provides advisory or other consulting services in any capacity to, an individual, corporation, association, organization, or other business entity, including a subsidiary, that is competing for, or is performing, a covered contract.

''(3) RULES.—For purposes of carrying out paragraph (2), the Oversight Board shall adopt rules to carry out the following:

"(A) To be eligible to advise or consult the Oversight Board with respect to the review, procurement, or performance of a covered contract, a third-party advisory or consulting firm shall certify to the Oversight Board that the third-party advisory or consulting firm is not disqualified from advising the Oversight Board under paragraph (2).

"(B) Any officer or employee of a third-party advisory or consulting firm who prepares, presents, or certifies any information or report with respect to the certification of the third-party advisory or consulting firm under subparagraph (A) for the Oversight Board, or any agent of the Oversight Board, that is intentionally false or misleading, or, on learning that any such information is false or misleading, fails to immediately advise the Oversight Board or an agent of the Oversight Board in writing, shall be subject to prosecution and penalties under law.

"(C) If, after an investigation conducted by the Oversight Board, the Oversight Board determines that a third-party advisory or consulting firm has provided services to the Oversight Board in violation of paragraph (2), has failed to submit a certification required under subparagraph (A), or is in violation of subparagraph (B) (including any rules adopted under subparagraph (A) or (B)), the Oversight Board shall immediately refer such information to the Attorney General for the covered territory and the Office of the United States Attorney for the covered territory.''.

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Legislative Update

Biden's Student Loan Debt-Relief Plan

Will the Gears Stay in Motion Toward Implementation, or Grind to a Halt by Litigation?

After more than two years of deliberations and intense debate since advocating for student loan debt-forgiveness on the campaign trail in 2020,[1] President Joe Biden on Aug. 24 put forward a three-pronged plan to provide student loan debt relief, including extending the moratorium on collections to Dec. 31. Working with Secretary of Education Miguel Cardona, President Biden said that the plan's aim was to "provide more breathing room for people so they have less burden by student debt and, quite frankly, to fix the system itself."[2] The release of the plan was years in the making, with intense lobbying from both sides of the political spectrum. Now, as of press time, some conservative lawmakers and political groups are considering challenging the plan.[3]

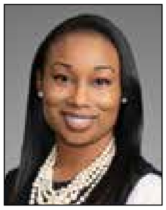
This article will provide a review of the administration's plan, along with insights from three experts who spoke on the topic in April at the 2022 ABI Annual Spring Meeting (ASM).[4] Among the many issues they addressed during their "Student Debt/Student Loans" session, **Veronica D. Brown-Moseley** of the Boleman Law Firm, PC (Richmond, Va.), Prof. **Robert M. Lawless** of the University of Illinois College of Law (Champaign, Ill.) and **Stacey Wells Salters** of Thompson Coburn LLP (Dallas) contemplated some of the possible mechanics and potential legal challenges of an executive action to cancel student loan debt. Nearly four months after their session at ASM, the three have graciously agreed to add their insights to the review of the plan and update their take on any legal challenges that could ensue.

"Three Prongs"

The Biden administration's plan aims to provide student loan debt relief through three mechanisms: (1) targeted debt relief; (2) making changes to the current student loan system; and (3) taking steps to reduce the price of college going forward and increase accountability. The first prong has garnered the most attention and scrutiny as it aims to fulfill President Biden's campaign commitment to provide debt-cancellation for student borrowers. Under this first prong, the Department of Education (DOE) will provide up to $20,000 in debt-cancellation to Pell Grant recipients with loans held by the DOE, and up to $10,000 in debt-cancellation to non-Pell Grant recipients. Borrowers are eligible for

Veronica D. Brown-Moseley

Prof. Robert M. Lawless



Stacey Wells Salters

this relief if their individual income is less than $125,000 ($250,000 for households). To ensure a smooth transition to repayment and prevent unnecessary defaults, the Biden administration extended the current COVID-19-era pause on federal student loan repayment one final time, through Dec. 31, 2022. Borrowers should expect to resume payment in January 2023.

The administration estimates that this prong of the plan would provide relief to up to 43 million borrowers, including cancelling the full remaining balances for roughly 20 million borrowers. The DOE estimates that, among borrowers who are no longer in school, nearly 90 percent of relief dollars will go to those earning less than $75,000 a year, and that the Pell Grant relief will help narrow the racial wealth gap.

The second prong of the plan makes changes to rules for income-driven repayment (IDR) of student loans. The DOE will put forward a new rule to implement these changes. The details will need to await promulgation of the rule, but the White House outlined the changes as follows:

- Raise the floor for IDR to 225 percent of the federal poverty level — about the annual equivalent of a $15 minimum wage for a single borrower. No one making less than that amount will have to make a monthly payment. The previous floor had been 150 percent of the federal poverty level.
- For undergraduate loans, cut in half the amount that borrowers have to pay each month under an IDR plan from 10 percent to 5 percent of discretionary income. The amount remains at 10 percent for graduate loans.
- Borrowers in an IDR plan will receive forgiveness after 20 years. For borrowers with original loan balances of $12,000 or less, forgiveness happens after 10 years of payments. The DOE estimates that this reform will allow nearly all community college borrowers to be debt-free within 10 years.
- Cover the borrower's unpaid monthly interest, so that unlike other existing IDR plans, no borrower's loan balance will grow as long as they make their monthly payments — even when that monthly payment is $0.

1 Twitter post by @JoeBiden (March 22, 2020), *available at* twitter.com/JoeBiden/status/1241869418981920769 (unless otherwise specified, all links in this article were last visited on Sept. 13, 2022).

2 "Remarks by President Biden Announcing Student Loan Debt Relief Plan," White House Briefing Room (Aug. 25, 2022), *available at* whitehouse.gov/briefing-room/speeches-remarks/2022/08/25/remarks-by-president-biden-announcing-student-loan-debt-relief-plan.

3 Tony Romm, Jeff Stein & Danielle Douglas-Gabriel, "Republicans Are Readying Lawsuits to Block Biden's Student Debt Plan," *Washington Post* (Sept. 1, 2022), *available at* washingtonpost.com/us-policy/2022/09/01/republicans-sue-biden-student-debt.

4 A full replay of the panel discussion will be available for purchase from cle.abi.org; materials from the session are *available at* abi.org/education-events/sessions.

• Starting in the summer of 2023, borrowers will be able to allow the DOE to automatically pull their income information year after year, avoiding the hassle of needing to recertify their income annually.

The Biden administration also has aimed to fix the Public Service Loan Forgiveness (PSLF) program by proposing a rule that borrowers who have worked at a nonprofit, in the military, or in federal, state, tribal or local government receive appropriate credit toward loan forgiveness. The planned improvements aim to build on temporary changes the DOE has already made to the PSLF, under which more than 175,000 public servants have already had more than $10 billion in loan forgiveness approved.

The third and final prong of the plan focuses on protecting future students and taxpayers by aiming to reduce the cost of college and holding schools accountable when they hike up prices. Under this mechanism, the DOE will publish an annual watch list of the programs with the worst debt levels in the country, and request institutional improvement plans from the worst actors that outline how the colleges with the most concerning debt outcomes intend to bring down debt levels.

Implementation vs. Litigation

Upon release of the plan, conservatives immediately assailed it as fiscally irresponsible and unfair to the millions of Americans who never attended college, never borrowed or who paid off their loans.[5] Conversely, some liberal lawmakers and activists who had called for Biden to cancel even more loans criticized the plan as not going far enough.

In the days following the plan's release, a number of GOP attorneys general from states, including Arizona, Missouri and Texas, met privately to discuss a strategy that could see multiple cases filed in different courts around the country. Other influential conservatives — including Sen. Ted Cruz (R-Texas) and allies of the Heritage Foundation, a conservative think tank — were mulling their own legal options against the new policies.

Anticipating the legal challenges that awaited the plan, the Biden Administration on Aug. 24 also released a legal opinion asserting that the Higher Education Relief Opportunities for Students (HEROES) Act gives the Education Secretary the "authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID-19 pandemic."[6] The HEROES Act, first enacted in the wake of the Sept. 11 attacks, provides the Education Secretary authority to grant relief from student loan requirements during specific periods (a war, other military operation or national emergency, such as the COVID-19 pandemic) and for specific purposes (including to address the financial harms of such a war, other military operation, or emergency). "Specifically, the HEROES Act authorizes the Secretary to 'waive or modify any statutory or regulatory provision applicable to the student financial assistance programs' if the Secretary 'deems' such waivers or modifications 'necessary to ensure" at least one of several enumerated purposes, including that borrowers are 'not placed in a worse position financially' because of a national emergency," according to the memo, citing 20 U.S.C. § 1098bb(a)(1) and (2)(A).

When Salters, Prof. Lawless and Brown-Moseley discussed the potential executive action in April, Prof. Lawless predicted that there would be legal challenges over whether the President has the authority to cancel student debt. Reviewing the lay of the land after President Biden's announcement, Prof. Lawless commented, "Student-loan forgiveness advocates have a strong argument about the executive branch's authority under the HEROES Act. Under the Trump Administration, the [DOE] had a different interpretation. The resolution of these challenges will depend a lot on where the case gets heard." Prof. Lawless also noted that there is a substantial question over whether anyone has legal standing to sue over the President's actions. "Legal standing is often in the eye of the beholder, and it won't be much of an obstacle to brush past for a court eager to strike down the president's debt relief package," Prof. Lawless said.

Regardless of the ultimate outcome of that litigation, there would be uncertainty while the litigation was pending. Brown-Moseley in April provided a potential course for consumer attorneys to take in light of this uncertainty. "I would probably try to convince the debtor to still list the student loan creditor and to list the debt [in their bankruptcy petition]," she said. "Maybe list it as unknown or disputed or something of that nature so that in the event several years from now, if the judicial branch determines that the President was not authorized and we need to reopen the case and file a dischargeability action, the creditor got notice initially."

Following President Biden's announcement, Brown-Moseley commented, "As student loan cancellation is pending and legal challenges are possible, continuing to list the student loan creditor in the bankruptcy petition is likely to be the best practice. The claim amount of the debt could be listed as unknown, and the debt could be marked as disputed." She also noted that additional questions are raised about the timing of the student loan cancellation and potential legal challenges. "Will student loan cancellation occur prior to the expiration of the student loan repayment pause? What will happen if legal challenges are pending when the student loan repayment pause expires? Will student loan cancellation occur prior to the resolution of legal challenges?"

"This is where policy considerations should protect consumers from inequities that may result over legal challenges to these potentially polarizing political decisions," Salters commented. "Ultimately, bankruptcy courts are courts of equity that often protect parties who have detrimentally relied, which would be a strong argument in the case of executive order with this level of national attention. Courts would surely consider this reliance before deciding to apply decisions retroactively." abi

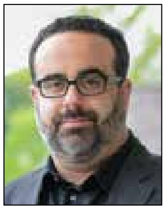
5 Danielle Douglas-Gabriel & Jeff Stein, "Biden to Cancel Up to $10,000 in Student Loans, $20K for Pell Recipients," *Washington Post* (Aug. 24, 2022), *available at* washingtonpost.com/education/2022/08/24/biden-student-loan-cancellation.

6 "The Secretary's Legal Authority for Debt Cancellation," Office of the Gen. Counsel, U.S. Dep't of Educ. (Aug. 23, 2022), *available at* www2.ed.gov/policy/gen/leg/foia/secretarys-legal-authority-for-debt-cancellation.pdf.

Legislative Update

By Maurice "Mac" VerStandig

A Brief History of Student Loan Treatment in Bankruptcy Cases



Coordinating Editor
Maurice "Mac" VerStandig
The VerStandig Law Firm; Washington, D.C.

Mac VerStandig is the managing partner of The VerStandig Law Firm, LLC in Washington, D.C., and represents debtors and private lenders in chapter 11 cases.

As the 118th Congress begins its work, a blend of campaign promises[1] and previous legislative introductions[2] offer every reason to believe that the dischargeability of student loans in bankruptcy will again be up for congressional debate. Regardless of whether any bills ultimately find their way to presidential endorsement and enactment, this will not be the first time the treatment of higher education debts in bankruptcy has been considered by the legislative branch. This Congress may, however, prove to be the first to meaningfully consider genuinely impactful legislation in 18 years (or, in educational parlance, since most of this year's college freshmen were born).

While the new Congress gains its footing, it is worth revisiting the vast expanses the topic has traveled over the preceding decades. The dischargeability of student loans has varied, appreciably, over the life of the Bankruptcy Code. If "past is prologue,"[3] the governing threshold may well be in for yet another substantive change before the 119th Congress is convened.

The Bankruptcy Act

In 1976, the Higher Education Act of 1965 was amended to contain an express prohibition on the discharge of student debts "without a showing of hardship."[4] However, in the brief interregnum between that date and the enactment of the Bankruptcy Code just a few years later, Congress made a "presumed mistake"[5] and repealed the express prohibition in 1978.[6] For a fleeting moment in time, there were minimal — if any — substantive obstacles to debtors seeing a discharge of their student loans through bankruptcy proceedings.[7]

That is not to posit that a discharge under the Bankruptcy Act was much akin to one under the laws of the present day. Well into the 1970s, various courts — still using the nomenclature of "bankrupt" when referencing a debtor — seemingly partook in the stigmatization of those seeking relief under federal law, with the U.S. Court of Appeals for the Eighth Circuit going so far as to note that "a discharge does not free the bankrupt from all traces of the debt, as though it had never been incurred. This Court has held that a moral obligation to pay the debt survives discharge and is sufficient to permit a State to grant recovery to the creditor on the basis of a promise subsequent to discharge, even though the promise is not supported by new consideration."[8] As recently as 1979, the U.S. District Court for the Southern District of New York was forced to judicially end the practice "of denying access to transcripts to persons who are delinquent in their payments of student loans that had been discharged in bankruptcy" on the basis that such "runs afoul of the Bankruptcy Act."[9]

Bankruptcy Code v1.0

The original iteration of the Bankruptcy Code only prohibited the discharge of student loan obligations if the debt was owed "to a government unit, or a nonprofit institution of higher education, for an educational loan" and, even then, only extended the prohibition to debts less than five years of age, while also providing an exception for "undue hardship."[10] In palpable contrast to the present regime of dischargeability, student loans could be extinguished through bankruptcy as long as (1) the funds were not owed to the government or a nonprofit college; (2) the debt was more than five years old; and/or (3) the debt would create an undue hardship.

As noted by Hon. **Rebecca Buehler Connelly** of the U.S. Bankruptcy Court for the Western District of Virginia in a 2021 opinion that contains one of the most sweeping and comprehensive histories of the interplay between student loans and bankruptcy, stated differently the general rule was that § 523(a)(8)(A) "declare[d] such [student] loans nondischargeable for five years after they first came due, but § 523(a)(8)(B) create[d] an exception to the general rule if the failure to discharge would 'impose an undue hardship on the debtor and the debtor's dependents.'"[11] Just one year later, the provisions of § 523(a)(8) were amended to broaden the

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1 Michael Stratford, "Student Debt Relief Resurfaces in Campaign TV Ads as Legal Battle Heats Up," *Politico* (Oct. 24, 2022), *available at* politico.com/newsletters/weekly-education/2022/10/24/student-debt-relief-surfaces-in-campaign-tv-ads-as-legal-battle-heats-up-00063074 (last visited Jan. 24, 2023).
2 Consumer Bankruptcy Reform Act of 2022, S. 4980, 117th Cong. (2022).
3 William Shakespeare, *The Tempest*, Act 2, sc. 1.
4 *In re Freeman*, 5 B.R. 24, 25 (Bankr. D. Minn. 1980).
5 *Id.* at 26.
6 *Id.* (citing P.L. 95-598 (H.R. 8200), Nov. 6, 1978, 92 Stat. 2549).
7 *Id.*
8 *Girardier v. Webster Coll.*, 563 F.2d 1267, 1271 (8th Cir. 1977) (citing *Zavelo v. Reeves*, 227 U.S. 625, 629 (1913)).
9 *Lee v. Bd. of Higher Educ. in City of New York*, 1 B.R. 781, 787 (S.D.N.Y. 1979).
10 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2591 (1978).
11 *In re Bell*, 633 B.R. 164, 172-73 (Bankr. W.D. Va. 2021) (quoting *In re Brunner*, 46 B.R. 752, 753 (S.D.N.Y. 1985), *aff'd sub nom.*, *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987)).

variety of loans that would be subject to the five-year waiting period (or a finding of undue hardship), with the law now applying to all loans made "for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education."[12]

The 1980s and 1990s

Those last three words — "of higher education" — were stricken from the Bankruptcy Code in 1984, when the Bankruptcy Amendments and Federal Judgment Act of 1984 "eliminate[d] the inference that the section applied only to nonprofit institutions associated with higher education."[13] This change would prove relatively minor compared to that which followed a half dozen years later, when the language was again amended to cover private loans of certain varieties.[14]

In 1990, Congress expanded the five-year period to seven years and broadened the category of impacted loans to all those "for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend."[15] Equally, Congress in 1990 also passed the Student Loan Default Prevention Initiative Act, which made it more difficult to discharge student loans through chapter 13 plans.[16]

In 1998, the temporal provision for discharging student loans — originally a mere five years in duration before being expanded to a full seven years — was deleted altogether.[17] As observed by Judge Connelly, "This left only one basis for debtors to have their student loans determined dischargeable: proving an 'undue hardship.'"[18]

BAPCPA

In the most recent notable change to the legislative treatment of student loans in bankruptcy proceedings, Congress reorganized § 523(a)(8) as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[19] These amendments "again expanded the types of student loans subject to the discharge exception beyond those insured or guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit or nonprofit institution."[20]

Courts have since turned their attention almost exclusively in this realm to the meaning and application of "undue hardship." A majority of judicial circuits have adopted the test set forth by the U.S. Court of Appeals for the Second Circuit in 1987 in *Brunner v. New York Higher Education Services Corp*.[21] However, at least two other circuits have opted in favor of a "totality-of-the-circumstances test."[22] It does not appear that any court in the District of Columbia Circuit (which, admittedly, has but a single bankruptcy court and a single district court) has adopted either test.[23]

The *Brunner* test requires a showing that (1) the debtor cannot maintain a "minimal" standard of living if made to repay the subject debts; (2) it appears the debtor's hardship will persist into the future; and (3) the "debtor has made good-faith efforts to repay the loans."[24] By contrast, the totality-of-the-circumstances test requires only a holistic analysis of "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and [their] dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case."[25]

The Future

The student loan dilemma is both unique and self-evident in nature; if such debts were freely dischargeable, recent graduates would be strongly incentivized to start filling out schedules and petitions before starting work.[26] As long as the means test is focused on a trailing income average, it would seem that most recent graduates could even first secure a job before taking to wiping away their loans, if unrestrained by the Bankruptcy Code.

Still, the treatment of student loans in bankruptcy appears, once again, ripe for a change — whether seismic, gradual or anything between. The Department of Education — in concert with the Department of Justice — has recently offered new guidance on assessing cases where a discharge of government loans is sought.[27] Yet while aimed at aiding debtors carrying student loan burdens through bankruptcy, even this new guidance will only apply to federal loans, and at that, it is only crafted to "apply the factors that courts consider relevant to the undue-hardship inquiry and determine whether to recommend that the bankruptcy judge discharge the borrower's student loan debt."[28]

Sen. Elizabeth Warren (D-Mass.) sought to make student loans dischargeable under a new chapter 10 when she introduced the Consumer Bankruptcy Reform Act of 2022 in the last Congress.[29] Other schemes and ideas no doubt also abound, with history showing that even more modest provisions — like the implementation of a five- or seven-year waiting period before loans become dischargeable — can prove effective while not bringing about the financial ruin of educational lenders. Just what bills will be introduced in the coming months, however, very much remains to be seen. abi

12 P.L. 96-56 (H.R. 2807), P.L. 96-56, Aug. 14, 1979, 93 Stat. 387.
13 *In re Segal*, 57 F.3d 342, 346-47 (3d Cir. 1995); (*citing* Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353 (H.R. 5174), P.L. 98-353, July 10, 1984, 98 Stat. 333).
14 *In re Segal*, 57 F.3d at 346-47.
15 *In re Bell*, 633 B.R. at 173-74 (quoting Crime Control Act of 1990, P.L. 101-647, Nov. 29, 1990, 104 Stat. 4789, 4964-65).
16 *In re Sharp*, 415 B.R. 803, 809 (Bankr. D. Colo. 2009); (citing Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, Nov. 5, 1990, 104 Stat. 1388, 1388-28; 11 U.S.C. §§ 1328(a)(2), 523(a)(8)).
17 Higher Education Amendments of 1998, P.L. 105-244, Oct. 7, 1998, 112 Stat. 1581, 1837.
18 *In re Bell*, 633 B.R. at 174.
19 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-08, April 20, 2005, 119 Stat. 23, 59.
20 *In re Bell*, 633 B.R. at 174.
21 *Id.* at 171. *See also Brunner v. New York Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).
22 *In re Long*, 322 F.3d 549, 553 (8th Cir. 2003); *In re Bronsdon*, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).
23 *In re Bryant*, 2021 WL 4203606, at *4 (Bankr. D.D.C. 2021).
24 *Id.* (quoting *Brunner*, 831 F.2d at 396).
25 *Id.* (quoting *In re Long*, 322 F.3d at 554).
26 *In re Segal*, 57 F.3d 342, 348 (3d Cir. 1995) ("Although limited, the legislative history of section 523(a)(8) teaches that the exclusion of educational loans from the discharge provisions was designed to remedy abuses of the educational loan system by restricting the ability of a student to discharge an educational loan by filing for bankruptcy shortly after graduation, and to safeguard the financial integrity of educational loan programs.") (*citing* 124 Cong.Rec. 1791-98 (1978); *In re Pelkowski*, 990 F.2d 737, 743 (3d Cir. 1993)).
27 "Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers," U.S. Dep't of Justice, (Nov. 17, 2022), *available at* justice.gov/opa/pr/justice-department-and-department-education-announce-fairer-and-more-accessible-bankruptcy.
28 *Id.*
29 Consumer Bankruptcy Reform Act of 2022, S. 4980, 117th Cong. (2022).

Legislative Update

Coming Back Around: Legislative Issues Likely to Resurface in the 118th Congress

While new legislation and fresh issues await both chambers of the 118th Congress, which convened on Jan. 3, insolvency practitioners should anticipate a number of priority bankruptcy issues resurfacing from previous sessions of Congress for consideration on Capitol Hill. This article provides a look at the changes to the legislative landscape in the 118th Congress, along with a brief overview of bankruptcy issues that are likely to regain the legislative spotlight.

Legislative Landscape Changes

As a result of the congressional elections in 2022, Democrats added to their narrow majority in the Senate, while Republicans overtook control of the House of Representatives by a slim margin. Democrats gained one seat in the Senate, expanding their previous majority in the 117th Congress from 50/50 (with a caucus of 48 Democrats, two independents, and Vice President Kamala Harris serving as the tie-breaker) to 51/49 (with a caucus of 48 Democrats and three independents) in the 118th Congress. Republicans won control of the House for the first time since the 115th Congress and now maintain a 222-212 majority.

Democrats previously maintained slim majorities in both legislative chambers and President Biden in the White House during the 117th Congress. With the chambers now split between Democratic and Republican control for the 118th, legislative priorities, strategies and outlooks on legislative issues will also shift as greater collaboration and bipartisanship on proposals will be needed for legislation to pass during the current session of Congress.

New Congress, Persistent Issues

While both chambers started fresh on Jan. 3, the following important insolvency and debt issues received considerable legislative attention in previous congressional sessions and will likely remain in the spotlight during the 118th Congress.

Cryptocurrency

The implosion and chapter 11 filing of FTX at the end of 2022 drew the ire of Congress and further calls to statutorily address the grey area of classification of cryptocurrency and regulatory jurisdiction: Should cryptocurrencies not already under the regulatory umbrella of the Securities and Exchange Commission (SEC) be considered a security and regulated by the SEC, or should they be considered a commodity and regulated by the Commodity Futures Trading Commission (CFTC)? If considered a security, cryptocompanies must then comply with tighter SEC rules for registration and reporting. However, many in the industry advocate that cryptocurrencies are more like commodities and would prefer that they be subject to the CFTC's rules. Both SEC Chair Gary Gensler and CFTC Chair Rostin Behnam continue to advocate for their respective agencies to take the lead in cryptocurrency oversight.

Two pieces of legislation that received considerable attention last year in the Senate (and were the subject of intense lobbying by the crypto industry) sought to classify cryptocurrency as a commodity and bring it under the oversight of the CFTC. The first was the "Digital Commodities Consumer Protection Act of 2022," introduced by Senate Agriculture Committee Chair Debbie Stabenow (D-Mich.) and Ranking Member John Boozman (R-Ark.). The bill provides the CFTC with authority to regulate the trading of digital commodities — mandating consistent, rigorous rules for all market participants.[1] While S. 4760 received a hearing in the Senate Agriculture Committee on Sept. 15 and has a companion bill in the House,[2] it was not brought up for a committee vote in the 117th Congress. In addition, Sen. Stabenow announced on Jan. 5 that she will not be running for re-election in 2024.[3]

A larger legislative package was introduced on June 7 in the 117th Congress by Sens. Kirsten Gillibrand (D-N.Y.) and Cynthia Lummis (R-Wyo.). The "Lummis-Gillibrand Responsible Financial Innovation Act" proposes to "create a complete regulatory framework for digital assets that encourages responsible financial innovation, flexibility, transparency and robust consumer protections while integrating digital assets into existing law," according to a Gillibrand press release.[4] The legislation was considered at a Senate Banking, Housing, and Urban Affairs Committee hearing on Sept. 15, but did not come up for a committee vote.

While it is unclear whether both proposals would be re-introduced as originally drafted following the collapse of FTX, prospects are high that more bills will be introduced looking to resolve the question of how cryptocurrency should be regulated in order to protect investors and consumers.

1 "Boozman, Stabenow, Booker and Thune Introduce Legislation to Regulate Digital Commodities," Senate Agriculture Committee Press Release (Aug. 3, 2022), *available at* boozman.senate.gov/public/index.cfm/2022/8/boozman-stabenow-booker-and-thune-introduce-legislation-to-regulate-digital-commodities. (unless otherwise specified, all links in this article were last visited on Jan. 9, 2023).
2 H.R. 8730, the "Digital Commodities Consumer Protection Act of 2022."
3 "Michigan Sen. Debbie Stabenow Not Running for Reelection," *Roll Call* (Jan. 5, 2023), *available at* rollcall.com/2023/01/05/michigan-sen-debbie-stabenow-not-running-for-reelection.
4 "Lummis, Gillibrand Introduce Landmark Legislation to Create Regulatory Framework for Digital Assets," Office of Kirsten Gillibrand Press Release (June 7, 2022), *available at* gillibrand.senate.gov/news/press/release/-lummis-gillibrand-introduce-landmark-legislation-to-create-regulatory-framework-for-digital-assets.

Student Loans

While many eyes were previously on Congress and the Biden administration regarding potential policy fixes to the student loan debt crisis, attention at the start of 2023 will be focused on the U.S. Supreme Court. The Court has scheduled arguments on Feb. 28[5] in response to legal challenges to President Biden's plan to cancel up to $20,000 in student debt for tens of millions of Americans. Republicans and conservative groups have filed at least six lawsuits to try to halt the policy, arguing that it's an overreach of executive authority and unfair in a number of ways.

The administration turned to the Supreme Court on Nov. 18 to vacate the nationwide injunction put in place on Nov. 14 by a federal appeals court, temporarily barring Biden's student loan debt-relief program.

The other case stems from a federal judge in Texas striking down the administration's program on Nov. 10, saying that the law "does not provide the executive branch clear congressional authorization to create a $400 billion student loan forgiveness program," according to court documents.

While the fate of the student debt forgiveness plan is considered by the High Court, the Biden administration announced on Nov. 22 that it would extend the pause on student loan payments once again. The extension is intended to give the Supreme Court time to rule on the lawsuits brought against Biden's student loan program during its upcoming term. The pause on payments will lift either 60 days after the Supreme Court issues a decision on the program, or 60 days after June 30, depending on which date comes first, the Department of Education said.

Consumer Bankruptcy Overhaul

Two pieces of legislation proposing sweeping changes to the consumer bankruptcy system were reintroduced in both chambers last session. Sen. Elizabeth Warren (D-Mass.) and previous House Judiciary Committee Chairman Jerrold Nadler (D-N.Y.) on Sept. 28 reintroduced the "Consumer Bankruptcy Reform Act" (CBRA), which proposes to "simplify and modernize the consumer bankruptcy system and make it easier for consumer debtors." The legislation aimed to replace the two separate consumer bankruptcy chapters, 7 and 13, with a single system proposed as "chapter 10," the goal being to streamline the filing process and reduce filing fees.

Sens. Warren and Nadler originally introduced the CBRA at the end of the 116th Congress on Dec. 9, 2020. The legislation did not receive a hearing, and while a hearing was scheduled late in the 117th Congress, it was postponed and not rescheduled. With the path to passage going through the Republican-controlled House, prospects for the CBRA, if reintroduced, have much higher obstacles in the 118th Congress.

Mass Tort Bankruptcies

While former House Judiciary Committee Chair Jerrold Nadler (D-N.Y.) ushered the "Nondebtor Release Prohibition Act" to committee passage in November 2021, and the Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights held a hearing on Feb. 8, 2022, on the issue of the "Texas Two-Step" strategy in mass tort chapter 11 cases, no legislation aimed at third-party releases or the Texas Two-Step strategy was considered on the floor of either chamber in the 117th Congress. Although the calculus to passage of legislation may have become more challenging in the 118th, anticipate new legislative proposals being introduced and others reintroduced as the public spotlight continues to shine on high-profile cases such as *LTL Management*, *Aearo Technologies* and *Purdue Pharma*. abi

5 *Biden v. Nebraska* (22-506) and *Dept. of Education v. Brown* (22-535), *available at* supremecourt.gov/oral_arguments/calendars/MonthlyArgumentCalFebruary2023.html.

Legislative Update

Crypto and Congress: An Overview of Key Developments This Year

The rapid growth of the cryptocurrency market and digital asset-trading platforms have been accompanied by increasing regulatory scrutiny and legislative concerns.[1] Forty-two bills were introduced in the 117th Congress containing the word "cryptocurrency," and the Biden administration and regulatory agencies have continued working to construct parameters for protecting consumers and financial institutions, while not stifling the nascent industry. This article will provide a brief overview of the top legislative and administration proposals released over the past year, insights into how the proposals might be of importance to practitioners, and prospects on future cryptocurrency legislation.

A key starting point regarding cryptocurrency proposals occurred this year on March 9 when President Joe Biden issued Executive Order 14067, "Ensuring Responsible Development of Digital Assets."[2] The Executive Order acknowledged that some digital asset-trading platforms and service providers had grown rapidly in size and complexity and that they might not be subject to or in compliance with appropriate regulations or supervision. "Digital asset issuers, exchanges and trading platforms, and intermediaries whose activities may increase risks to financial stability, should, as appropriate, be subject to and in compliance with regulatory and supervisory standards that govern traditional market infrastructures and financial firms, in line with the general principle of 'same business, same risks, same rules,'" according to the order. Many in the cryptocurrency community praised the order as an acknowledgement of cryptocurrency's importance and the necessity of ensuring proper regulation.[3]

Within the list of priorities, the Executive Order directed the Department of the Treasury and other agency partners to assess and develop policy recommendations to address the implications of the growing digital-asset sector and changes in financial markets for consumers, investors, businesses and equitable economic growth. The Executive Order also encouraged regulators to ensure sufficient oversight and safeguard against any systemic financial risks posed by digital assets. The Executive Order further encouraged the Financial Stability Oversight Council to identify and mitigate systemic financial risks posed by digital assets and to develop appropriate policy recommendations to address any regulatory gaps.

Since the Executive Order was issued, agencies across the government have worked to develop frameworks and policy recommendations that advance the six key priorities identified therein: (1) consumer and investor protection; (2) promoting financial stability; (3) countering illicit finance; (4) U.S. leadership in the global financial system and economic competitiveness; (5) financial inclusion; and (6) responsible innovation.

On Sept. 16, 2022, in connection with the reports mandated by the Executive Order, the White House released the "Comprehensive Framework for Responsible Development of Digital Assets," which encompassed the findings of various reports.[4] The reports encouraged regulators like the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC), consistent with their mandates, to aggressively pursue investigations and enforcement actions against unlawful practices in the digital-asset space. The reports also encouraged the Consumer Financial Protection Bureau and Federal Trade Commission, as appropriate, to redouble their efforts to monitor consumer complaints and to enforce against unfair, deceptive or abusive practices.

Many crypto industry leaders thought the reports and proposed framework were too focused on risk. Specifically, "[w]hile intended to be part of a broader government and stakeholder effort to bring better regulation to crypto assets, these reports focus on risks — not opportunities — and omit substantive recommendations on how the United States can promote its burgeoning crypto industry," said Kristin Smith, executive director of the U.S.-based Blockchain Association.[5]

The focal point of intense crypto lobbying battles on Capitol Hill has been to address the grey area of classification and regulatory jurisdiction: Should cryptocurrencies not already under the regulatory umbrella of the SEC be considered a security and regulated by the SEC, or should they be considered a commodity and regulated by the CFTC? If considered a security, cryptocompanies must then comply with tighter SEC rules for registration and reporting. However, many in the industry advocate that cryptocurrencies are more like commodities and would prefer them to be subject to the CFTC's rules. Both SEC Chair Gary Gensler and CFTC Chair Rostin Behnam continue to advocate for their respective agencies to take the lead in cryptocurrency oversight.

Two pieces of legislation that have received considerable attention in the Senate (and were the subject of intense lobbying by the crypto industry) seek to classify cryptocurrency as

1 ABI thanks **Alan R. Rosenberg** of Markowitz, Ringel, Trusty + Hartog, PA (Fort Lauderdale, Fla.) for his contributions and insights to this article. He frequently writes and speaks on the intersection of cryptocurrency and bankruptcy, and he is a 2020 ABI "40 Under 40" honoree.

2 "Executive Order on Ensuring Responsible Development of Digital Assets," White House (March 9, 2022), *available at* whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets (unless otherwise specified, all links in this article were last visited on Nov. 7, 2022).

3 Kristin Smith, "President Biden's Crypto Order Is a Huge Step Forward for the Industry," CoinDesk (March 9, 2022), *available at* coindesk.com/layer2/2022/03/09/president-bidens-crypto-order-is-a-huge-step-forward-for-the-industry (op-ed from Blockchain Association).

4 "Fact Sheet: White House Releases First-Ever Comprehensive Framework for Responsible Development of Digital Asset," White House (Sept. 16, 2022), *available at* whitehouse.gov/briefing-room/statements-releases/2022/09/16/fact-sheet-white-house-releases-first-ever-comprehensive-framework-for-responsible-development-of-digital-assets.

5 "Blockchain Association Reacts to Biden Administration's Executive Order on Digital Assets Findings," Blockchain Ass'n (Sept. 16, 2022), *available at* theblockchainassociation.org/blockchain-association-reacts-to-biden-administrations-executive-order-on-digital-assets-findings.

a commodity and bring it under the oversight of the CFTC. The first is S.4760, the "Digital Commodities Consumer Protection Act of 2022," introduced on Aug. 3 by Senate Agriculture Committee Chair Debbie Stabenow (D-Mich.) and Ranking Member John Boozman (R-Ark.). The bill provides the CFTC with the authority to regulate the trading of digital commodities — mandating consistent, rigorous rules for all market participants.[6] While S.4760 received a hearing in the Senate Agriculture Committee on Sept. 15 and has a companion bill in the House,[7] it has yet to be brought up for a committee vote.

A larger legislative package was introduced earlier in the summer by Sens. Kirsten Gillibrand (D-N.Y.) and Cynthia Lummis (R-Wyo.). S.4356, the "Lummis-Gillibrand Responsible Financial Innovation Act," was introduced on June 7 and proposes to "create a complete regulatory framework for digital assets that encourages responsible financial innovation, flexibility, transparency and robust consumer protections while integrating digital assets into existing law," according to a Gillibrand press release.[8] The legislation was considered at a Senate Banking, Housing and Urban Affairs Committee hearing on Sept. 15, but has not yet come up for a committee vote. The bill has also been referred to the Senate Agriculture Committee for consideration.

The "commodity vs. security" debate is not just an interesting intellectual exercise; it is of critical importance to bankruptcy practitioners who are more routinely coming into contact with cryptocurrency and other digital assets. The recent explosion of crypto bankruptcies may ultimately force bankruptcy courts to classify cryptocurrency to render appropriate rulings. For example, if cryptocurrencies are securities, what additional hurdles and regulatory approvals will be required to conduct a § 363 sale? Will inappropriate uses of cryptocurrency result in nondischargeable debts under § 523(a)(19)? If cryptocurrency is considered a commodity, are trustees and debtors entitled to recover the appreciated value of crypto assets in avoidance actions? Without concrete regulatory guidance, the answer to these questions and many others, is unclear.

As stakeholders, regulators and lawmakers work to achieve a consensus on the question of jurisdiction — and, by extension, classification — Congress's legislative calendar left the key pieces of crypto legislation on life support. Complete consideration of these legislative items before the conclusion of the 117th Congress will be challenging, considering the current congressional recess for election season and short window of time before the session concludes. However, as the spotlight continues to be drawn to the growth and risks of cryptocurrency, prospects are likely that legislative proposals to address key issues such as jurisdiction, classification and other regulatory considerations will emerge quickly in the 118th Congress when it convenes next year. abi

6 "Boozman, Stabenow, Booker and Thune Introduce Legislation to Regulate Digital Commodities," Senate Agriculture Committee (Aug. 3, 2022,) *available at* boozman.senate.gov/public/index.cfm/2022/8/boozman-stabenow-booker-and-thune-introduce-legislation-to-regulate-digital-commodities.

7 H.R. 8730, the Digital Commodities Consumer Protection Act of 2022.

8 "Lummis, Gillibrand Introduce Landmark Legislation to Create Regulatory Framework for Digital Assets," Gillibrand Press Release (June 7, 2022), *available at* gillibrand.senate.gov/news/press/release/-lummis-gillibrand-introduce-landmark-legislation-to-create-regulatory-framework-for-digital-assets.

Legislative Update

By Robert J. Keach and Adam Prescott

President Biden Signs Bankruptcy Threshold Adjustment and Technical Corrections Act into Law

Robert J. Keach
Bernstein Shur Sawyer & Nelson, PA
Portland, Maine

Adam Prescott
Bernstein Shur Sawyer & Nelson, PA
Portland, Maine

Bob Keach is co-chair of Bernstein Shur Sawyer & Nelson, PA's Business Restructuring and Insolvency Practice Group. He is a past ABI President and co-chair of ABI's Commission to Study the Reform of Chapter 11. Adam Prescott is a shareholder in the same office.

Editor's Note: *For more information about the legislation, be sure to check ABI's SBRA Resources page (abi.org/SBRA) for information on a webinar featuring Mr. Keach and members of ABI's Legislative Committee discussing the provisions of the new law.*

The Bankruptcy Threshold Adjustment and Technical Corrections Act (BTATCA)[1] reached the finish line on June 21, 2022, when President Joe Biden signed it into law after several months of it working its way through Congress. Among other changes, the BTATCA provides greater access for struggling small businesses, individuals and families looking to achieve a financial fresh start, including by restoring the debt-eligibility ceiling to $7.5 million for individuals and small businesses electing to file for bankruptcy under subchapter V of chapter 11, after the prior increase to $7.5 million had sunset in March 2022.

The BTATCA also raises the debt limit for individual chapter 13 filings to $2.75 million and removes the distinction between secured and unsecured debt for that calculation. Although the BTATCA was originally drafted to make these eligibility thresholds permanent, the final version provides that the increases will sunset two years after enactment, on June 21, 2024. This article provides a review of the legislative history leading to the BTATCA's enactment and highlights some of the provisions that practitioners should be aware of going forward.

The Winding Road to Enactment

As a direct result of the work of the ABI Commission to Study the Reform of Chapter 11,[2] the Small Business Reorganization Act of 2019 (SBRA)[3] became effective on Feb. 19, 2020, just before the onset of the COVID-19 pandemic and its resulting economic challenges. While the ABI Commission originally recommended a debt-eligibility limit of $10 million to debtors looking to elect subchapter V, as a result of necessary compromises to ensure passage, the SBRA initially set the eligibility limit at $2,725,625.

In response to the economic distress related to the pandemic, the "Coronavirus Aid, Relief, and Economic Security (CARES) Act[4] was enacted on March 27, 2020, to temporarily increase the debt-eligibility limit from $2,725,625 to $7.5 million for individuals and small businesses electing to file under subchapter V. Congress extended the $7.5 million debt limit last year with the enactment of the COVID-19 Bankruptcy Relief Extension Act of 2021,[5] but the higher debt threshold was due to return to $2,725,625 on March 27, 2022, unless Congress intervened.

Sen. Charles Grassley (R-Iowa) introduced the bipartisan S.3823 on March 14, 2022, aiming to make the subchapter V debt limit permanent at $7.5 million and index it to inflation, increase the chapter 13 debt limit to $2.75 million and remove the distinction between secured and unsecured debt in that calculation, make certain technical amendments to the SBRA, and make technical amendments to the Bankruptcy Administration Improvement Act. Senate Judiciary Chair Richard Durbin (D-Ill.) and Sens. Sheldon Whitehouse (D-R.I.) and John Cornyn (R-Texas) co-sponsored the legislation. The chapter 13 debt limit increase was consistent with the recommendations of the ABI Commission on Consumer Bankruptcy.[6]

Due to competing priorities and procedural issues, however, the Senate failed to address S.3823 prior to the March 27, 2022, sunset of the $7.5 million subchapter V eligibility debt limit. The debt ceiling then reverted back on March 28, 2022, to the original ceiling of $2,725,625.

Undeterred, Sen. Grassley introduced a legislative substitute for S.3823 that retained many of the same provisions as the original bill, but with two key tweaks. First, it covered any chapter 11 case eligible under the reinstated subchapter V debt limit that was pending or filed after the March 27, 2022, sunset. Second, the debt-eligibility limits for both subchapter V and chapter 13 would sunset after two years rather than become permanent. The legisla-

1 Public Law No. 117-151.
2 "Proposed Recommendations: Small and Medium-Sized Enterprise (SME) Cases," Final Report of the ABI Comm'n to Study the Reform of Chapter 11 (December 2014), p. 275, *available at* commission.abi.org/report (unless otherwise specified, all links in this article were last visited on July 1, 2022).
3 Public Law No. 116-54.
4 Public Law No. 116-136.
5 Public Law No. 117-5.
6 "Chapter 13 Debt Limits," Final Report of the ABI Comm'n on Consumer Bankruptcy (April 2019), p. 146, *available at* consumercommission.abi.org.

tive substitute for S.3823 passed the Senate via unanimous consent on April 7, 2022, passed the House of Representatives (392-21) on June 7, 2022, and was signed into law by President Biden on June 21, 2022.

Analysis of Key Provisions

The BTATCA contains several statutory modifications, some of which are technical adjustments unlikely to have a significant impact on day-to-day bankruptcy practice, while others will immediately affect the ongoing reorganization efforts of small businesses and individuals.

$7.5 Million Debt Ceiling Increase for Subchapter V and Retroactive Relief

The BTATCA amends § 1182(1)(A) of the Bankruptcy Code to provide that an eligible subchapter V debtor (including its affiliates) must have "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."[7] It implements the increased debt ceiling retroactively by providing that the amendment applies to any case that was commenced on or after March 27, 2020, and was pending on the date of the BTATCA's enactment.[8]

Since the SBRA was enacted, case law has developed regarding eligibility for subchapter V debtors, including what it means for a debtor to be "engaged in commercial or business activities" under § 1182(1)(A). One eligibility issue that arose early under the SBRA was whether a debtor could "convert" to a subchapter V case from a pending "regular" chapter 11 case. A number of SBRA decisions addressed this issue, with most courts,[9] but not all,[10] taking a permissive view of a debtor's right to amend its petition to elect to continue its chapter 11 case under subchapter V, particularly where the debtor made the amendment promptly after the SBRA was enacted and the SBRA deadlines could still be met (or required only modest adjustments).

The BTATCA presents a similar retroactive opt-in feature for debtors that filed chapter 11 cases between March 28 and June 21, 2022, and would have been eligible for subchapter V under the prior $7.5 million debt ceiling. However, as long as these debtors act promptly to opt into subchapter V, they are unlikely to meet stiff resistance in making the election. With the BTATCA, Congress clearly and expressly intended for it to make the eligibility ceiling increase retroactive for debtors that missed out on subchapter V during the gap period while waiting on Congress to act, and § 1189(b) also authorizes courts to extend the 90-day deadline to file a plan in subchapter V "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable" — with the BTATCA clearly constituting one such circumstance.[11]

Chapter 13 Debt Ceiling Increase Provides Another Option for Business Owners

Although the SBRA's focus is often on small *business* debtors, individuals also may opt into subchapter V if they otherwise meet the eligibility criteria. However, the BTATCA provides another option for some individuals seeking a fresh start by raising the debt limit for individual chapter 13 filings to $2.75 million and removing the distinction between secured and unsecured debt for that calculation.[12] Individuals who are eligible for both chapter 13 and subchapter V will have a decision to make about which type of case best suits their situation, and it will be interesting to see whether statistics reflect a preference between the two moving forward.

Clarity Regarding "Issuer" Affiliates

The SBRA precludes publicly traded companies from proceeding under subchapter V by excluding from eligibility "any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934."[13] The CARES Act amended the SBRA to also exclude "any debtor that is an affiliate of an issuer," which is broadly defined in the Securities Exchange Act as "any person who issues or proposes to issue any security." Relying on this language, the U.S. Bankruptcy Court for the Central District of California recently concluded that the SBRA bars debtors if they or an affiliate are an "issuer," regardless of whether the debtor or its affiliate is a public company.[14] The BTATCA fixes this overly broad exclusion of entities from the SBRA by amending § 1182(1)(B)(iii) to exclude only debtors with an affiliate that is subject to the reporting requirements under § 13 or 15(d) of the Securities Exchange Act.

Technical Change to Subchapter V Cramdown

The BTATCA also amends § 1191(c)(3), which provides part of the modified standard for confirming cramdown plans in subchapter V. It limits the requirement that "the plan provides appropriate remedies, which may include the liquidation of nonexempt assets," only to situations in which the debtor is relying on § 1191(c)(3)(B) for cramdown. Such provision requires that "there is a reasonable likelihood that the debtor will be able to make all payments under the plan."[15] This change should not have a large effect on cramdown confirmation in subchapter V, because § 1191(c) provides a nonexhaustive list of factors for determining whether

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7 Public Law No. 117-151.

8 *Id.*

9 *See, e.g., In re Progressive Solutions Inc.*, 615 B.R. 894 (Bankr. C.D. Cal. 2020) (small business designated chapter 11 debtor could retroactively proceed under subchapter V after case was pending approximately 15 months); *In re Glass Contractors Inc.*, No. 20-40185 (Bankr. E.D. Tex. Feb. 25, 2020) (small business designated chapter 11 debtor could retroactively proceed under subchapter V after case was pending approximately one month); *In re Moore Props. of Person Cty. LLC*, No. 20-80081, 2020 WL 995544, at *7 (Bankr. M.D.N.C. Feb. 28, 2020) (small business designated chapter 11 debtor could retroactively proceed under subchapter V when it was not a small business debtor as defined by Bankruptcy Code when case was originally filed and case had been pending just over one week); *In re Body Transit Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020) (small business designated chapter 11 debtor could retroactively proceed under subchapter V when case was pending 48 days); *In re Bonert*, No. 2:19-bk-20836-ER, 2020 WL 3635869, at *5 (Bankr. C.D. Cal. June 3, 2020) (chapter 11 debtor could retroactively proceed under subchapter V when case was pending approximately five months).

10 *See, e.g., In re Double H Transp. LLC*, No. 19-31830-HCM, 2020 WL 2549850 (Bankr. W.D. Tex. March 5, 2020) (chapter 11 debtor could not retroactively proceed under subchapter V when the case had been pending more than three months); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fla. 2020) (retroactive subchapter V election is not permissible if debtor cannot comply with 90-day deadline for filing plan); *In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020) (debtor could not retroactively proceed under subchapter V because 90-day plan deadline had passed and facts and circumstances, including misrepresentations by the debtor, did not warrant modification of deadline).

11 11 U.S.C. § 1189(b).

12 Public Law No. 117-151.

13 11 U.S.C. § 1182(1)(A).

14 *In re Phenomenon Mktg. & Ent. LLC*, No. 2:22-BK-10132-ER, 2022 WL 1262001, at *4 (Bankr. C.D. Cal. April 28, 2022).

15 11 U.S.C. § 1191(c)(3)(B).

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a plan is "fair and equitable," and bankruptcy courts may consider the adequate remedies issues beyond situations arising under § 1191(c)(3)(B).

Conclusion

Since taking effect in February 2020, more than 3,500 debtors have elected to file under subchapter V of chapter 11. In addition to technical changes, the BTATCA further expands access to subchapter V, particularly through the increased debt ceiling. Although the modified eligibility threshold is still, for now, temporary, the BTATCA will provide at least two more years of expanded excess for individuals and small businesses seeking an opportunity to take advantage of the SBRA's benefits and achieve their fresh start. abi

Faculty

Robert J. Keach is is co-chair of Bernstein Shur's Business Restructuring and Insolvency Practice Group in Portland, Maine, and focuses his practice on the representation of various parties in workouts and bankruptcy cases, including debtors, creditors, creditors' committees, lessors and third parties acquiring troubled companies and/or their assets. He has appeared as a panelist on national bankruptcy, lender liability and creditors rights programs, and is the author of several articles on bankruptcy and creditors' rights appearing in the *ABI Law Review*, *Commercial Law Journal* and *ABI Journal*, among other publications. Mr. Keach is a contributing author to *Collier Guide to Chapter 11: Key Topics and Selected Industries* (2011 Ed.). He is recognized as a "Star Individual" in Corporate M&A/Bankruptcy in *Chambers USA*, in *The Best Lawyers in America* (Ten-Year Certificate), and by *New England Super Lawyers* (Bankruptcy and Top 100 Lawyers in New England regardless of specialty). He is Board Certified in Business Bankruptcy Law by the American Board of Certification. Mr. Keach currently serves as the chapter 11 trustee in the railroad reorganization case of Montreal Maine & Atlantic Railway, Ltd., a cross-border restructuring case. He also is the fee examiner in the Exide Technologies case in Delaware, and was the fee examiner in *In re AMR Corporation* (the chapter 11 cases of American Airlines and its parent and certain affiliates). He also has, *inter alia*, represented ad hoc committees in the Homebanc Mortgage, New Century TRS Holdings and Nortel Networks cases in Delaware, as well as a public utilities commission in the FairPoint Communications case in the Southern District of New York. Mr. Keach is a Fellow of the American College of Bankruptcy and a past president (2009-10) of ABI. He received ABI's Lifetime Achievement Award in 2021 and co-chaired ABI's Commission to Study the Reform of Chapter 11. Mr. Keach received his J.D. in 1980 from the University of Maine.

Prof. Robert M. Lawless is the Max L. Rowe Professor of Law and co-director of the Program on Law, Behavior & Social Science at the University of Illinois College of Law in Champaign, Ill., where he writes and teaches about bankruptcy, consumer finance and business law. He also served as the College's associate dean for research from 2013-16. Prof. Lawless served as the reporter for the ABI's Commission on Consumer Bankruptcy and was the recipient of ABI's Service Award in 2019. He is a co-author of *Secured Transactions: A Systems Approach and Empirical Methods in Law*. He also is a regular contributor to the blog Credit Slips, a discussion on credit, finance and bankruptcy. Prof. Lawless has testified before Congress, and his work has been featured in media outlets such as CNN, C-SPAN, NPR, the *New York Times*, the *Wall Street Journal*, *USA Today*, the *National Law Journal*, the *L.A. Times* and the *Financial Times*. Prof. Lawless is a member of the American Law Institute and the National Bankruptcy Conference, and he is a Fellow in the American College of Bankruptcy. He received both his undergraduate degree in accounting and his J.D. from the University of Illinois, during which time he served as editor-in-chief of the *University of Illinois Law Review*.

Amy A. Quackenboss is the executive director of the American Bankruptcy Institute in Alexandria, Va. Prior to initially joining ABI as deputy executive director and general counsel, she practiced law at Hunton & Williams LLP, where she focused her practice on bankruptcy litigation and restructuring. Ms. Quackenboss has significant experience representing lenders, secured and unsecured creditors, indenture trustees, creditors' committees, and acquirers of assets in chapter 11 bankruptcies. In 2002, she was honored with the H. Sol Clark award by the State Bar of Georgia for her commitment to *pro* *bono* work. Ms. Quackenboss received her B.A. from Miami University of Ohio and her J.D. from Washington & Lee School of Law, and upon graduation clerked for a U.S. magistrate judge in the Southern District of West Virginia.

Jack D. Solano is counsel with Sen. Richard Durbin's Judiciary Committee staff, where he covers bankruptcy policy, among other issues. Previously, he served as counsel with the House Committee on Homeland Security and worked as a junior associate in Willkie Farr & Gallagher's Litigation department. Mr. Solano received his B.A. in political science and government in 2014 from Howard University and his J.D. in 2017 from Harvard Law School.