



The Scope and Retroactivity of the Honoring American Veterans in Extreme Need  
“HAVEN” Act in Chapter 7 and Chapter 13 Bankruptcy Cases

Carole Ann Liscio, J.D. Candidate 2021

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## INTRODUCTION

On August 23, 2019, President Donald J. Trump signed the Honoring American Veterans in Extreme Need Act (the “HAVEN Act”).<sup>1</sup> Congress stated that the HAVEN Act’s purpose is to correct an “obvious inequity” in title 11 of the United States Code (the “Bankruptcy Code”) as it relates to veterans.<sup>2</sup> The HAVEN Act is silent as to whether it applies retroactively.<sup>3</sup> Certain courts, however, have explored the idea that it should apply to cases pending as of the HAVEN Act’s enactment.<sup>4</sup>

This memorandum analyzes whether the HAVEN Act can be applied retroactively or only to cases filed following its enactment. Part I examines the HAVEN Act itself, Part II examines the legislative history surrounding the HAVEN Act, and Part III examines the *Landgraf* test and its application to the HAVEN Act.

### I. Exploring the HAVEN Act

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<sup>1</sup> H.R. 2938.

<sup>2</sup> 165 Cong. Rec. H7215-01, 2019 WL 3307644 (July 23, 2019).

<sup>3</sup> See H.R. 2938.

<sup>4</sup> *In re Gresham*, No. 18-56289, WL 1170712 at \*4 (Bankr. E.D. Mi. March 10, 2020).

The HAVEN Act altered the definition of “current monthly income” to support veterans in bankruptcy.<sup>5</sup> A debtor’s current monthly income (“CMI”) is the “average monthly income from all sources that the debtor receives.”<sup>6</sup> CMI is calculated in order to determine whether a debtor’s income meets the threshold to file for protection under chapter 7 of the Bankruptcy Code, or in the alternative, whether the debtor must file under chapter 13.<sup>7</sup> Therefore, the purpose of the CMI calculation is to determine whether the debtor’s income is high enough to make payments to unsecured creditors.<sup>8</sup>

Before the enactment of the HAVEN Act, veteran benefits were included in a debtor’s CMI calculation. Section 101(10A) of the Bankruptcy Code, which defines CMI, now excludes<sup>9</sup>:

(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

This section excludes the mentioned veteran benefits from the Debtor’s CMI calculation, therefore lowering a debtor’s average income and thereby increasing the debtor’s chances to be eligible to file for relief under chapter 7 of the Bankruptcy Code.

#### ***A. Legislative history surrounding the HAVEN Act***

The legislative history for the HAVEN Act indicates that the act is intended to correct an “obvious inequity” in the Bankruptcy Code.<sup>10</sup> This inequity is apparent when comparing the

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<sup>5</sup> H.R. 2938.

<sup>6</sup> 11 U.S.C. § 101(10A) (2011).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Prior to the enactment of the HAVEN Act, section 101(10A) only excluded “benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism or domestic terrorism on account of their status as victims of such terrorism” from the CMI calculation. 11 U.S.C. § 101(10A) (2011).

<sup>10</sup> 165 Cong. Rec. H7215-01, 2019 WL 3307644 (July 23, 2019).

exclusion of Social Security benefits from a debtor’s CMI calculation to the inclusion of veteran benefits in that calculation. In a 2005 amendment to section 101(10A) of the Bankruptcy Code, Social Security benefits were excluded from a debtor’s CMI calculation because “bankruptcy shouldn’t be made more difficult for those who are depending on Social Security for their livelihood.”<sup>11</sup>

Similar to Social Security benefits, veteran benefits “are a lifeline to many of its recipients,” and in turn including these benefits within the CMI calculation would make bankruptcy more difficult for those recipients.<sup>12</sup> When veteran benefits are considered income for CMI purposes, veterans “become ineligible for the more immediate discharges available under Chapter 7 and, instead, they are steered into Chapter 13.”<sup>13</sup> Therefore, because “these benefits are earned, and we must do right by our veterans and protect their economic security,” the HAVEN Act excludes veteran benefits from the CMI calculation.<sup>14</sup>

## **II. Retroactivity of the HAVEN Act**

“Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary.”<sup>15</sup> According to the legislative history, Congress believed the HAVEN Act would produce beneficial effects for veterans who are filing for bankruptcy because it will “remedy an imbalance in the Bankruptcy Code that disproportionately steers veterans receiving such benefits into Chapter 13 cases because they often fail the Chapter 7 means test.”<sup>16</sup> Therefore by amending section 10(10A), Congress is correcting an obvious mistake in treating

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<sup>11</sup> House Report No. 116-169 (2019) (statement of Edward Kennedy).

<sup>12</sup> 165 Cong. Rec. H7215-01, 2019 WL 3307644 (July 23, 2019).

<sup>13</sup> *Id.*

<sup>14</sup> <https://www.baldwin.senate.gov/press-releases/haven-act>.

<sup>15</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994).

<sup>16</sup> <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=393996>.

Social Security benefits and veteran benefits disproportionately, and by proving they consider this law advantageous.

#### ***A. The Landgraf Test***

In *Landgraf v. USI Film Products*, the United States Supreme Court implemented the current standard to determine whether a statute can be retroactively applied.<sup>17</sup> According to the *Landgraf* test, to determine whether a federal statute can be applied retroactively it first must be determined whether Congress “has expressly prescribed the statute’s proper reach.”<sup>18</sup> If the statute contains no express language as to retroactivity as the HAVEN Act does, then it must be determined whether the retroactive effect would (1) impair rights a party possessed when he acted, (2) increase a party’s liability for past conduct (3) or impose new duties with respect to transactions already completed.<sup>19</sup> If applying the new statute would not affect one of these three areas, it can be retroactive.<sup>20</sup>

#### ***B. Application of the Landgraf Test***

The HAVEN Act is silent as to retroactivity, however “[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably property in many situations.”<sup>21</sup> *In re Gresham* is the only reported decision thus far to discuss the issue of retroactivity as it applies to the HAVEN Act.<sup>22</sup> In *In re Gresham*, the bankruptcy court held that applying the HAVEN Act retroactively would impair the rights a party, the unsecured creditors, possessed when the creditor acted, and therefore it could not be applied.<sup>23</sup> The court found that the unsecured creditors had a right to rely on the debtor’s confirmed schedules, which

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<sup>17</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244.

<sup>18</sup> *Id.* at 280.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 273.

<sup>22</sup> *In re Gresham*, No. 18-56289, WL 1170712 at \*4 (Bankr. E.D. Mi. March 10, 2020).

<sup>23</sup> 2020 WL 1170712 at \*4.

included her veteran benefits.<sup>24</sup> Additionally, the court stated, “the right of those unsecured creditors to object to confirmation would be impaired by a ‘retroactive’ application of the HAVEN Act to confirmation of the Debtor’s plan.”<sup>25</sup> In taking this view, the court rejected the debtor’s argument that the unsecured creditors had no right to be paid out of her veteran benefits and therefore no right of theirs was impaired.<sup>26</sup>

### ***C. In re Gresham: Debtor’s Arguments***

Although the court found to the contrary, the Debtor’s argument in *In re Gresham* is more consistent with the HAVEN Act’s legislative history. The rationale for exclusion of Social Security benefits and veteran benefits were similar, however, Social Security benefits were excluded while veterans were not.<sup>27</sup> Further, while unsecured creditors obtain a right to object to the confirmation of a plan, they cannot object because that plan does not include veteran benefits, just as they cannot object because the plan does not include Social Security benefits.<sup>28</sup>

As the Debtor and Trustee in *In re Gresham* agree, the second prong of the *Landgraf* test is not at issue because applying the HAVEN Act retroactively does not increase the unsecured creditor’s liability for past conduct.<sup>29</sup> Prior to the HAVEN Act, veteran benefits were included in a debtor’s CMI calculation.<sup>30</sup> Therefore, by including those benefits in a bankruptcy plan of reorganization, the unsecured creditors were following current law and would not be liable for doing so.

Additionally, applying the HAVEN Act retroactively would not impose any new duties on unsecured creditors with respect to transactions that are already completed. The primary issue

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> House Report No. 116-169 (2019).

<sup>28</sup> *In re Gresham*, 2020 WL 1170712, at \*4.

<sup>29</sup> *Id.*

<sup>30</sup> 11 U.S.C. § 101(10A) (2011).

the court faced in *In re Gresham* was whether the HAVEN Act provided a sufficient ground to modify the debtor’s confirmed plan pursuant to section 1329(a) of the Bankruptcy Code.<sup>31</sup> The court recognized that the plan modification is based on the change made under the HAVEN Act, and if the modification is applied to the CMI calculation it would have a substantial impact on the debtor’s financial circumstances.<sup>32</sup> On this issue the court held that “the HAVEN Act provides a legitimate reason for modification . . . to the Debtor’s plan for its duration.”<sup>33</sup>

Therefore, applying the HAVEN Act retroactively would not impose any new duties with respect to transactions already completed that *In re Gresham* did not already authorize.<sup>34</sup> Because the court held that the HAVEN Act provides a sufficient reason to ask for modification, veterans who filed under chapter 13 of the Bankruptcy Code will modify their plans under this decision.<sup>35</sup> Although those plans were previously confirmed and therefore completed, *In re Gresham* gives unsecured creditors the duty to modify those plans.<sup>36</sup> In this way, going back to modify already completed plans based on the HAVEN Act is equivalent to retroactively applying it to confirmed plans.

## CONCLUSION

Congress’ purpose in enacting the HAVEN Act was to correct a mistake in the Bankruptcy Code -- that Social Security benefits were excluded from a debtor’s CMI calculation while veteran benefits were not.<sup>37</sup> In correcting this mistake Congress acknowledged that similar to Social Security benefits, these benefits are a lifeline to veterans who receive them and in order

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<sup>31</sup> *In re Gresham*, 2020 WL 1170712, at \*4. U.S.C. 1329(a) states “at any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim,” but is silent as to what showing must be made to modify a confirmed plan.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.*

<sup>34</sup> WL 1170712 at \*5.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 165 Cong. Rec. H7215-01, 2019 WL 3307644 (July 23, 2019).

to properly honor their service they must be excluded.<sup>38</sup> One court has held that the HAVEN Act should not be applied retroactively. Nevertheless, there are arguments that would support its retroactive application, including that doing so would not impair a right an unsecured creditor possessed, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

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<sup>38</sup> House Report No. 116-169 (2019).