

NATIONAL BANKRUPTCY CONFERENCE

*A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration*

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United States Senate
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March 22, 2020

Re: Economic Crisis Caused by SARS-CoV-2 Virus

Dear Speaker Pelosi, Rep. McCarthy and Sens. McConnell and Schumer:

The National Bankruptcy Conference (“NBC”) has been devoted to the improvement of the Bankruptcy Code and its predecessors for over 80 years, furthering the goals of providing a fresh start for individuals, preserving jobs and asset values and ensuring fair treatment of creditors through the bankruptcy process. In this extraordinary time, as a nation, we face the prospect of an unprecedented wide-spread need for relief from financial obligations solely because of the SARS-CoV-2 virus (or COVID-19). It threatens the lives, the livelihoods, and the savings of millions of Americans. We must ensure that our bankruptcy system provides effective and efficient relief to direct and indirect victims of the virus, but more critically, we should provide at least temporary relief from financial obligations for individuals and businesses to avoid massive numbers of both bankruptcies and economically untenable foreclosures. Even at its best, the bankruptcy process will not prevent the huge loss of jobs and value throughout all of our communities, for debtors and creditors alike, caused by the COVID-19 disease.

We therefore support generally the measures being taken by federal, state, and local governments to provide liquidity immediately for individuals and businesses and urge even further action. We also applaud efforts to provide greater access to a more efficient bankruptcy process as we believe it is inevitable that, despite extraordinary government assistance, COVID-19 will cause many bankruptcies.

We support the proposed legislation currently being considered regarding (i) new tax credits to get needed cash to small and medium-size businesses; (ii) changes to the bankruptcy filing limits for small businesses; (iii) amendments to Chapter 13 for additional relief for consumer debtors; and (iv) a broader approach to creating a breathing space for debtors. We address each of those issues in turn.

1. *Tax credits.* We understand that Congress is considering legislation that would provide small and medium-size businesses with tax credits (including refundable credits) to be used against their 2019 tax liability. We support this measure to give businesses liquidity which could avoid further job losses and bankruptcies. By providing businesses with credits to use against 2019 liabilities, the legislation would allow businesses to obtain the cash benefit of those credits immediately simply by filing their 2019 tax return, or even by releasing funds that the businesses have held in reserve to pay the taxes when they come due (now extended to July 15). In particular, we understand that certain members of Congress have considered credits for the payment of rent, (or principal and interest on mortgages), and/or payroll costs, for a portion of the 2019 year. This type of credit would be particularly useful for smaller businesses in the restaurant and fast-food businesses, travel, entertainment, certain medical and dental, etc., businesses that were strong before this crisis started and will be strong once we are beyond the crisis. We also understand that Congress is considering significant adjustments to the small business lending program offered through the Small Business Administration, which would include loans to businesses that could later be forgiven based on employee retention. We fully support the expansion of this program, which we believe should be in addition to the issuance of tax credits to small and medium-sized businesses, and not in lieu of such credits.

2. *Availability of reorganization relief for small businesses.* Congress enacted the Small Business Reorganization Act (SBRA) in 2019, and it became effective last month. It eliminates many of the obstacles that prevent financially distressed small businesses from successfully reorganizing in chapter 11. SBRA was, with a few modifications, based on a proposal made by the National Bankruptcy Conference which strongly supported its enactment.

Currently, only small businesses with aggregate liquidated debts of not more than \$2,725,625 are eligible for SBRA relief. The Conference in its proposal recommended that the debt threshold be significantly higher (\$7,500,000), and it is still the Conference's position that the threshold should be higher to accommodate more small businesses.

The economic effects of the pandemic on small businesses are likely to be catastrophic, and many thousands of small businesses will seek reorganization relief. Increasing the eligibility debt threshold to \$7,500,000 (or even higher), at this time would make SBRA relief available to many thousands of small businesses in desperate circumstances to the benefit of their owners, creditors, suppliers, customers, employees and the entire economy.

3. *Availability of relief for consumer debtors.* Chapter 13 provides a means for individual debtors to repay their creditors under court supervision over a three- to five-year period. It allows them to save their homes and their motor vehicles, which are often the only means of getting to work and continuing to earn income to support their families and pay creditors. Certain features of chapter 13 should be adjusted in view of the current crisis.

These include:

- Excluding from “disposable income,” for pending as well as future cases, any relief payments a chapter 13 debtor receives from federal, state, or local governments. Otherwise, for debtors currently performing chapter 13 plans, the relief payments may be swept directly to their creditors, leaving the debtors without the relief necessary to support their families, which is the main purpose of the relief. For debtors that file as a result of COVID-19 dislocation, treating such relief payments as disposable income will require much higher payments to creditors under a plan at a time when the debtor cannot afford it. Such payments should be excluded from property of the bankruptcy estate and current monthly income, so that they do not operate to render a debtor ineligible for chapter 7 or become part of the property that a chapter 7 trustee will liquidate and distribute to creditors.
- Debtors operating under current chapter 13 plans should be permitted to modify their plans if a COVID-19 dislocation affects their income and ability to perform under their plans. Current law would not permit plan modifications and would leave chapter 13 debtors without the promised chapter 13 relief.
- If a COVID-19 dislocation prevented a debtor from keeping current on plan payments, a modification might involve a payment moratorium. Unless the deferred payments could be added to the end of the payment period, the relief would be short-lived. Accordingly, the court should be permitted to extend the payment period by any amount of time during which payments are deferred.
- Congress should once again revisit whether to permit mortgage modification in chapter 13 cases: wide-spread foreclosures in the current circumstance can drastically erode property values with adverse consequences on the housing market nationwide. We have seen the effects of collapsing housing values when a community is hit with widespread foreclosures; mortgage modification rather than foreclosure may avert this on a much broader scale.

4. *Breathing Space for Debtors.* Individuals and businesses need a period of breathing space to regroup since the onslaught of the COVID-19 crisis. There is an existing legislative model for such protections in the Servicemembers Civil Relief Act of 2003 (“SCRA”), which revised and updated the Soldiers’ and Sailors’ Civil Relief Act of 1940. The SCRA protects members of the armed forces, including reservists called to active duty, whose ability to meet certain civil obligations is materially affected by their military service. Once triggered, the SCRA grants a number of temporary protections, including: (i) a stay of the foreclosure, repossession, or sale of property to satisfy debts; (ii) a 90-day stay of proceedings to evict a tenant from rental housing; (iii) protection against the entry of default judgments in civil actions or administrative proceedings; and (iv) a 90-day stay of civil actions or administrative proceedings. To be clear, the SCRA has a broad reach, with more sweeping protections for servicemembers than the provisions highlighted above. Its core protections, however, should serve as a template for legislative action that seeks to help individuals and businesses more broadly during the COVID-19 outbreak. These protections do not forgive debts or permanently forbid proceedings to collect debts. Instead, they would grant a temporary pause on evictions, repossessions, foreclosures, and similar proceedings that will follow from the severe dislocations caused by the pandemic.

NATIONAL BANKRUPTCY CONFERENCE

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005. Most recently, the Conference played a leading role in developing the Small Business Reorganization Act of 2019, Pub. L. 116-54.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

Technical and Advisory Services to Congress. To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

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