AMERICAN BANKRUPTCY INSTITUTE

2020 Midwestern Virtual Bankruptcy Institute

COVID-19 Economic Fallout: Consumer Issues

Sponsored by Hinkle Law Firm LLC

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CONCURRENT SESSION

2020

COVID-19 Economic Fallout Consumer Issues

- David Prelle Eron, Prelle, Eron & Bailey, Wichita, KS, Moderator
- Ryan J. Dattilo, U.S. Senate Judiciary Committee, Washington, DC
- David P. Leibowitz, Law Offices of David P. Leibowitz, LLC, Chicago, IL
- Alice L. Whitten, Wells Fargo Legal Department, Irving, TX

The Counter-Intuitive Effects of COVID-19 on Bankruptcies

Filing Statistics – Consumer Case Decline

	End Sept 2020	End Sept 2019	End Sept 2018	% Chng ('19-'20)	Kansas
■ Chapter 7 Filings	290,432	360,369	356,762	-19.4%	-29.1%
■ Chapter 13 Filings	122,917	214,725	214,836	-42.8%	-42.5%
■ Other Filings	6,699	5,376	5,012	+24.6%	-31.3%
■ **TOTAL FILINGS**	**420,048**	**580,470**	**576,610**	**-27.6%**	**-35.1%**

The months of August and September saw the decline *accelerate* nationally.

- Filing statistics are derived from AACER as reported to the ABI by EPIQ (https://www.abi.org/newsroom/bankruptcy-statistics).

Filing Statistics – Business Increase?

- **Most of the "Other Filings" are Chapter 11 Cases**
- **They increased by almost 25% for the period**
- **But according to Ed Flynn (UST and ABI)[1] the increase may be artificial**
- **Between June 29 and August 2 (five weeks), the following filings occurred:**

	Total 11's	Solo/Parent Cases	Child Cases
2020	786	337	449
2019	529	360	169

- **Thus, even chapter 11 cases appear to be decreasing, if you do not "double-count" affiliated cases (though this may be an indication that larger cases are being filed)**

[1] Per Bob Lewis (https://www.creditslips.org/creditslips/2020/08/most-of-what-you-read-about-the-bankruptcy-filing-rate-is-wrong.html).

Should Congress Increase the Chapter 13 Debt Limits?

HEROES Act of 2020

- On May 15, 2020, the United States House of Representatives passed the Heroes Act to "respond[] to the COVID-19 (i.e., coronavirus disease 2019) outbreak and its impact on the economy, public health, state and local governments, individuals, and businesses."
- Contained in the Heroes Act were several bankruptcy provisions, including the following:
  - *EXPANDED ELIGIBILITY FOR CHAPTER 13.—Section 109(e) of title 11, United States Code, is amended—*
    - (A) by striking "$250,000" each place the term appears and inserting "$850,000"; and
    - (B) by striking "$750,000" each place the term appears and inserting "$2,600,000".

Who May Be a Debtor

- Section 109(e) of the Bankruptcy Code (**1994**) provides:
  - *Only an individual **with regular income** that owes, on the date of the filing of the petition, **noncontingent, liquidated, unsecured debts of less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000 . . .** may be a debtor under chapter 13 of this title.*

Who May Be a Debtor (cont'd)

- Section 109(e) of the Bankruptcy Code (**April 1, 2019, adjusted for inflation**) provides:
  - *Only an individual **with regular income** that owes, on the date of the filing of the petition, **noncontingent, liquidated, unsecured debts of less than ~~$250,000~~ $419,275 and noncontingent, liquidated, secured debts of less than ~~$750,000~~ $1,257,850 . . .** may be a debtor under chapter 13 of this title.*

Who May Be a Debtor (cont'd)

- Section 109(e) of the Bankruptcy Code (**with HEROES Act proposed update**) provides:
  - *Only an individual **with regular income** that owes, on the date of the filing of the petition, **noncontingent, liquidated, unsecured debts of less than** ~~$250,000~~ ~~$419,275~~ **$850,000 and noncontingent, liquidated, secured debts of less than** ~~$750,000~~ ~~$1,257,850~~ **$2,600,000 . . .** may be a debtor under chapter 13 of this title.*

Legislative History

- Congress enacted the chapter 13 debt limits as part of the Bankruptcy Reform Act of 1978, which expanded chapter 13 eligibility to sole proprietor businesses.
- Prior to the Bankruptcy Reform Act of 1978, only "an individual whose principal income [was] derived from wages, salary, or commissions" was eligible to be a debtor under chapter 13.
- Congress found the alternative of chapter 11 to be "too cumbersome a procedure for the small, self-employed businessman", noting that "[t]o avoid the complexity, many simply liquidate their assets in straight bankruptcy."
- To that end, Congress changed § 109(e) to include all individuals "with regular income."

Legislative History (cont'd)

- As originally enacted, the debt limits for chapter 13 eligibility were $100,000 in noncontingent, liquidated, unsecured debts and $350,000 in noncontingent, liquidated, secured debts.
- These ceilings were expanded by section 108(a) of the Bankruptcy Reform Act of 1994 to $250,000 and $750,000, respectively.
- The 1994 amendments also added section 104, which automatically adjusts the chapter 13 debt limits and other amounts for inflation every three years.
- The next Chapter 13 debt limit adjustment will occur on April 1, 2022.

Why Do We Have Chapter 13 Debt Limits?

- In expanding chapter 13 to business owners, Congress recognized that large businesses might be incentivized file under chapter 13 to avoid chapter 11.
- To keep large businesses from filing chapter 13 cases, Congress established the original debt limits.
  - *See Committee Report from 1978: The bill places dollar limitations on the amount of debts of the proprietor who may use chapter 13, in order to prevent sole proprietors with large businesses from abusing creditors by avoiding chapter 11. The limits create an irrebuttable presumption that chapter 13 is inappropriate for businesses with more than $100,000 in unsecured debt or more than $500,000 in secured debt. There may be businesses within those limits for which relief under chapter 11 is more appropriate than relief under chapter 13. If so, the bill permits conversion of the case to chapter 11.*

2019 Bankruptcy Reforms

- In August of 2019, Congress enacted the first substantive bankruptcy reforms since the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005.
  - *Family Farmer Relief Act*
  - *Small Business Reorganization Act*

Family Farmer Relief Act

- The Family Farmer Relief Act of 2019 raised the chapter 12 operating debt cap from an adjusted $4.4 million to $10 million, allowing more family farmers to seek relief under chapter 12.
- According to the Committee Report, "[t]he increase in the debt eligibility limit effectuated by H.R. 2336 reflects the fact that land and equipment values have increased as well as 'the average size of U.S. farming operations.'"

Small Business Reorganization Act (SBRA)

- Enacted in 2019, the SBRA created a new subchapter V to chapter 11 to streamline the bankruptcy process for small business debtors.
- According to the original sponsors of the SBRA, "Chapter 11 in the bankruptcy code was designed for administering complex business reorganizations involving multi-million dollar companies. Though several provisions specifically focus on small business debtors, a significant amount of research shows that Chapter 11 may still create difficulties for small businesses, including high costs, deficits and procedural roadblocks."

Small Business Reorganization Act (SBRA)

- To be eligible for subchapter V, a debtor must meet the definition of a "small business debtor" and elect to be a Subchapter V debtor.
- With its CARES Act amendment in 2020, the Bankruptcy Code section 101(51D) defines a small business debtor as:
  - *[A] person engaged in commercial or business activities (including any affiliate … and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate* ***noncontingent liquidated secured and unsecured debts … in an amount not more than*** ~~*$2,725,625*~~ ***$7,500,000**** *(excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor*

*The CARES Act amendment that includes the increased debt eligibility limits is in effort for one year

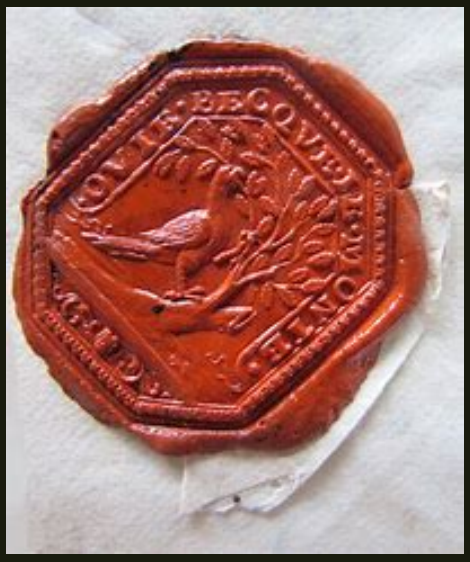
ABI Commission's Recommendation

- On May 3, 2019, the ABI Commission on Consumer Bankruptcy issued its report, which including the following proposal with respect to the chapter 13 debt limits:
  - *Congress should amend section 109(e) to provide that an individual is eligible for chapter 13 if the individual has less than $3,000,000 in total noncontingent, liquidated debts, eliminating the distinction between secured and unsecured debts. The new debt limit should continue to be adjusted for inflation according to section 104(a).*
  - *In the case of married persons, Congress should amend section 109(e) so the following rules clearly apply:*
    - If only one spouse files, the debts of the non-filing spouse that are not the liability of the filing spouse should not count against the filing spouse's debt limit. Debts of the filing spouse thus should not be aggregated with the debts of a non-filing spouse.
    - If both spouses file, each should have the benefit of the debt limit. Debts owed by both spouses are counted against each spouse's limit.

Technology Responses to Pandemic – Here to Stay?

Is Virtuality Authentic?

- Purposes of Signatures
  - *Authentication*
  - *Authorization*
  - *Acknowledgment of contents*
- Purposes of In-Person Meetings
  - *Verification of identity*
  - *Evaluation of witness*
  - *Physicality of interrogation – "In your face"*



EVOLUTION OF SIGNATURES

John Hancock

What is an ink signature?
A pen and ink signature is a **biometric**, not a secret. By careful examination of the physical paper, one can determine that a live person actually swished a pen over the paper, and thus that a live person with certain distinctive habits of writing made that mark.

Adding an Ink Signature to Microsoft Word or Excel Documents
•Open a Word or Excel document.
•Under the Review tab, choose Start inking.
•Hover to the place on the page where you want to sign.
•Write your signature.
•When finished, choose Close ink tools, Select objects, or press the ESCkey.
•Save the document to include the signature with it.

Characteristics of Wet Ink Signature

- Purposes of Signatures
  - *Authentication*
  - *Authorization*
  - *Acknowledgment of contents*
- Ink
- Timing
- Avoidance of forgery and unauthorized execution and filing of documents
- Allows signatory to verify that the signature presented was, in fact, their own.

Electronic Signature

- Purposes of Signatures
  - *Authentication*
  - *Authorization*
  - *Acknowledgment of contents*
- May be a facsimile of an actual manuscript signature
- May be a separate electronic document
- "Electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record

SOME ELECTRONIC SIGNATURES

Characteristics of Electronic Signatures

- Proof of initiation by the signatory
- Time and date of signature is verifiable
- Based on Public Key Infrastructure (PKI) and Certificate Authorities (CAs)
- Hash (string of data") assigned to the document allows the hash to be matched to the Public Digital Certificate to verify the signature.

IN-PERSON OR VIRTUAL?

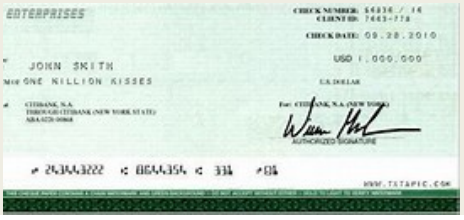
In Person Hearings and Meetings

- Immediacy
  - *Body language*
  - *Gestures*
  - *Facial Expression*
- Imposition
  - *Court, Trustee or Cross-Examination can be more imposing in person - more likely to elicit truth?*
  - *Administration of oath may seem more serious*
- Identification – match signature, identification documents

Remote Meetings and Court Hearings

- Saves time for all participants
- Avoids the need to travel long distances
- Lower impact on the environment
- Necessary to avoid transmission of disease during pandemic
- Most meetings or hearings are perfunctory anyway
- A personal meeting or hearing is possible if the remote meeting or hearing s not resolved satisfactorily
- Requires more advance planning

Which of these is “authentic”?



National and Local Moratoriums on Foreclosures and Evictions

CARES Act

- On March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act (CARES Act) in response to the COVID-19 outbreak
- Provided over $2 trillion in economic relief to consumers and small businesses
- Provided Economic Impact Payments to households with up to $1200/adult and $500/child based on income
- Created Paycheck Protection Program for small business to maintain payroll, hire back employees who may have been laid off, and cover overhead costs
- Employee Retention Credit available for employers that faced closure due to economic hardship due to COVID-19 allowed a 50% credit on up to $10,000 of wages paid during most of 2020
- $150B Coronavirus Relief Fund established to cover expenses incurred due to COVID-19 during 2020 not accounted for in existing budgets for state, local and tribal governments

CARES Act Foreclosure Moratorium

Effective 3/18/2020 – 5/17/2020

Section 4022. Foreclosure Moratorium and Consumer Right to Request Forbearance

(a)(2) - Federally backed mortgage loan – includes any loan which is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for occupancy of from 1-4 families

- FHA, FNMA, FHLMC, VA, USDA,

(c)(2) – Foreclosure Moratorium. Except with respect to a vacant or abandoned property, a servicer of a Federally backed mortgage loan **may not initiate** any judicial or non-judicial **foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale for not less than the 60 day period beginning on March 18, 2020.**

CARES Act Eviction Moratorium

Effective 3/18/2020 – 7/25/2020

Section 4024. Temporary Moratorium and Consumer Right to Request Forbearance

(a)(5) - Federally backed mortgage loan – slightly different definition than in 4022 – but generally covers same properties

- FHA, FNMA, FHLMC, VA, or USDA

(b) – [Eviction] Moratorium. During the 120-day period beginning on the date of enactment of this Act, the lessor of a covered dwelling may not –

(1) make, or cause to be made, any filing with the court of jurisdiction to initiate a legal action to recover possession of the covered dwelling from the tenant for non-payment of rent or other fees or charges; or

(2) charge fees, penalties, or other charges to the tenant related to such nonpayment of rent.

Presidential Executive Order (August 8, 2020)

https://www.whitehouse.gov/presidential-actions/executive-order-fighting-spread-covid-19-providing-assistance-renters-homeowners/

Executive Order on Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners

Sec. 2. Policy. It is the policy of the United States to **minimize**, to the greatest extent possible, **residential evictions and foreclosures during the ongoing COVID-19 national emergency**.

Sec. 3. Response to Public Health Risks of Evictions and Foreclosures. (a) **The Secretary of Health and Human Services and the Director of CDC shall consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession**.

(b) The Secretary of the Treasury and the Secretary of Housing and Urban Development shall identify any and all available Federal funds to provide temporary financial assistance to renters and homeowners who, as a result of the financial hardships caused by COVID-19, are struggling to meet their monthly rental or mortgage obligations.

(c) The Secretary of Housing and Urban Development shall take action, as appropriate and consistent with applicable law, to promote the ability of renters and homeowners to avoid eviction or foreclosure resulting from financial hardships caused by COVID-19. Such action may include encouraging and providing assistance to public housing authorities, affordable housing owners, landlords, and recipients of Federal grant funds in minimizing evictions and foreclosures.

(d) In consultation with the Secretary of the Treasury, the Director of FHFA shall review all existing authorities and resources that may be used to prevent evictions and foreclosures for renters and homeowners resulting from hardships caused by COVID-19.

Dept of Health and Human Services (HHS) - Center for Disease Control (CDC)

Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19

Effective 9/4/2020 – 12/31/2020

federalregister.gov/d/2020-19654
85 FR 55292

CDC Moratorium **prohibits a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, from evicting any covered person from any residential property in any jurisdiction** to which the Order applies **during the effective period of the Order**.

The Order does not apply in any State, local, territorial, or tribal area with a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order.

To invoke the CDC's order a covered person must provide an executed copy of the Declaration form attached to the CDC's order (or a similar declaration under penalty of perjury) to their landlord, owner of the residential property where they live, or other person who has a right to have them evicted or removed from where they live.

The Order does not relieve any individual of any obligation to pay rent, making a housing payment or comply with any other obligation under a lease or similar contract.

Nothing in the Order prohibits the charging or collecting of fees, penalties or interest as a result of failure to pay rent, as permitted under the terms of the underlying lease or contract.

Investor Directives related to Moratoriums

FHA

HUD 184 - DLL 2020-04 – Effective 3/20/2020 – 5/19/2020

Moratorium on Foreclosures and Evictions and Extension of Deadlines:

Properties secured by Sections 184 or 184A guaranteed loans are subject to a moratorium on foreclosure for a period of 60 days from the date of issuance. The moratorium applies to the initiation of foreclosure and to foreclosures in process.

In addition, deadlines of the first legal action and reasonable diligence timelines are extended by 60 days from the date of issuance.

Extensions and Clarifications of the Foreclosure Moratorium

- HUD 184 - DLL 2020-06 – Effective 5/19/2020 – 6/30/2020
- HUD 184 - DLL 2020-08 – Effective 6/30/2020 – 8/31/2020
- HUD 184 - DLL 2020-10 – Effective 9/1/2020 – 12/31/2020

Eviction suspensions followed same timelines and extensions

Investor Directives related to Foreclosure Moratoriums

FNMA - Fannie

Lender Letter (LL–2020–02) – Effective 3/18/2020 – 5/17/2020

Servicers instructed that they must suspend all foreclosure sales for the next 60 days, unless the property securing the mortgage loan had been determined to be vacant or abandoned.

Post-CARES Act, acknowledging that the servicer must now suspend foreclosure-related activities in accordance with the requirements of the CARES Act

Extensions of the Foreclosure Moratorium

- Updated 5/14/2020 – Effective 5/14/2020 – 6/30/2020
- Updated 6/24/2020 – Effective 6/30/2020 – 8/31/2020
- Updated 8/27/2020 – Effective 9/1/2020 – 12/31/2020

Note: FNMA completes its own evictions – so no servicer impact

Investor Directives related to Foreclosure Moratoriums

FHLMC - Freddie

Bulletin 2020-4 – Effective 3/18/2020 – 5/17/2020

FORECLOSURE SALE MORATORIUM

Servicers must **suspend all foreclosure sales (judicial or non-judicial)** for the next 60 days. This foreclosure suspension does not apply to Mortgages on properties that have been determined to be vacant or abandoned (prior to 3/18/2020).

Extensions of the Foreclosure Moratorium

- Bulletin 2020-10 – Effective 4/30/2020 – 6/30/2020
- Bulletin 2020-16 – Effective 5/14/2020 – 6/30/2020
- Bulletin 2020-25 – Effective 6/24/2020 – 8/31/2020
- Bulletin 2020-34 – Effective 8/27/2020 – 12/31/2020

Note: FHLMC completes its own evictions – so no servicer impact

Investor Directives related to Moratoriums

USDA

Bulletin – Effective 3/19/2020 – 5/18/2020

Foreclosure and Eviction Relief in Connection with Presidentially Declared COVID-19 National Emergency

Foreclosure and eviction moratorium for all USDA Single Family Housing Guaranteed Loans Program (SFHGLP) loans for a period of 60 days, in connection with the Presidentially declared COVID-19 National Emergency.

Borrowers with USDA guaranteed loans are subject to a moratorium on foreclosure for a period of 60 days. The moratorium applies to the initiation of foreclosures and to the completion of foreclosures in process. In addition, deadlines of the first legal action and reasonable diligence timelines are extended by 60 days.

Similarly, evictions of persons from properties secured by USDA guaranteed loans are also suspended for a period of 60 days.

Extensions of the Moratoriums

- Bulletin – Effective 5/18/2020 – 6/30/2020
  *** excluded from the extension cases where servicer has documented that the property is vacant or abandoned ***
- Bulletin – Effective 6/19/2020 – 8/31/2020
- Bulletin – Effective 8/28/2020 – 12/31/2020

Investor Directives related to Moratoriums

VA

Circular 26-20-8 & 26-20-12 – Effective 3/18/2020 – 5/17/2020

Foreclosure Moratorium for Borrowers Affected by COVID19

Moratorium on Foreclosure. VA strongly encourages loan holders to establish a sixty-day moratorium beginning March 18, 2020, on completing pending foreclosures or initiating new foreclosures on loans.

Due to the widespread impact of COVID-19, loan holders should consider the impact of completing an eviction action when choosing to retain a property instead of conveying to VA.

Foreclosure Moratorium. Except with respect to a vacant or abandoned property, a servicer of a Federally-backed mortgage loan may not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale for not less than the 60-day period beginning on March 18, 2020.

Extensions of the Moratoriums

- Bulletin 26-20-18– Effective 5/14/2020 – 6/30/2020
- Bulletin 26-20-22 & 23 – Effective 6/17/2020 – 8/31/2020
- Bulletin 26-20-29 & 30 – Effective 8/24/2020 – 12/31/2020
- Bulletin 26-20-12 (Update 1) – Effective 9/9/2020 – 12/31/2020
- ** excludes vacant and abandoned property from moratoriums **

Investor Directives related to Moratoriums

VA

Circular 26-20-8 & 26-20-12 – Effective 3/18/2020 – 5/17/2020

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Extensions of the Moratoriums

- Bulletin 26-20-18– Effective 5/14/2020 – 6/30/2020
- Bulletin 26-20-22 & 23 – Effective 6/17/2020 – 8/31/2020
- Bulletin 26-20-29 & 30 – Effective 8/24/2020 – 12/31/2020
- Bulletin 26-20-12 (Update 1) – Effective 9/9/2020 – 12/31/2020
- ** excludes vacant and abandoned property from moratoriums **

State Specific Moratoriums

Kansas

- Executive Order No. 20-06 & 20-10
  - Did no prohibit continuation of existing foreclosure or judicial eviction proceedings filed prior to 3/23/2020
  - Any bank, lending entity or landlord initiating a judicial foreclosure or eviction proceeding after 3/23/2020 shall have the burden of pleading and proving that the proceeding is not being initiated solely because of defaults or violations of mortgages or rental agreements substantially caused by financial hardship resulting from the COVID-19 pandemic.
  - No landlord shall evict a residential tenant when all defaults or violations of the rental agreement are substantially caused by financial hardship resulting from the COVID-19 pandemic.
  - Does not prevent foreclosures or evictions for mortgage or rental defaults or violations not due to a financial hardship resulting from the COVID-19 pandemic.
  - Effective 3/23/2020 to 5/1/2020 (or until the State of Disaster Emergency extended by 2020 House Bill 2016 expires)
- Executive Order No. 20-28 – extends to 5/31/2020 (expired?)
- Executive Order No. 20-61 – 8/17/2020 to 9/15/2020
- Executive Order No. 20-64 – 9/10/2020 to 1/26/2021
- State Supreme Court Administrative Order 20-PR-058 – SOL and other statutory timelines suspended until further order – no actions to be dismissed for want of prosecution

https://governor.kansas.gov/wp-content/uploads/2020/03/20-06-Executed.pdf.
https://governor.kansas.gov/wp-content/uploads/2020/03/EO-20-10-Executed.pdf
https://governor.kansas.gov/wp-content/uploads/2020/09/EO-20-64-Executed.pdf
https://www.kscourts.org/KSCourts/media/KsCourts/Orders/2020-PR-058.pdf

State Specific Moratoriums

Illinois

- Executive Order No. 8 – Effective 3/21/2020
  - Cease enforcement of orders of eviction for residential premises for duration of state of emergency
  - Nothing in Order should be construed as relieving any individual of obligation to pay rent, make mortgage payments or comply with any other term of lease, mortgage or other agreement.
  - Update state of emergency extended on 4/1/20 to 5/1/20
- Effective through 11/14/2020 (EO No. 30; EO No.39; EO No. 44; EO No. 48; EO No. 52; EO No. 55; EO No. 59)
- Illinois Department of Financial and Professional Regulation – Guidance to Illinois-Licensed Mortgage Servicers and Exempt Mortgage Servicers Urging Support for Borrowers Impacted by COVID-19, Including 90 Day Forbearance – Published 3/30/2020
  - Citing FHA, FNMA, FHLMC and VA suspensions of foreclosures and evictions
  - Urges postponing foreclosures and evictions for at least 90 days

https://www2.illinois.gov/IISNews/21288-Gov._Pritzker_Stay_at_Home_Order.pdf
https://www.idfpr.com/Forms/COVID19/2-Guidance%20to%20Illinois-Licensed%20Mortgage%20Servicers%20and%20Exempt%20Mortgage%20Servicers.pdf

State Specific Moratoriums

Indiana

- Executive Order Temporary Prohibition on Evictions and Foreclosures 20-06 – Effective 3/19/2020 until State of Emergency (EO 20-02) ends
  - No foreclosure or eviction may be initiated until the state of emergency has terminated.
  - Any applicable statute of limitations is suspended during that time.
  - Nothing in Order should be construed as relieving any individual of obligation to pay rent, make mortgage payments or comply with any other term of lease, mortgage or other agreement.
- State of Emergency extended through 8/14/2020 (EO 20-17; EO No. 20-25)
- EO 20-28 – Effective 5/22/2020 to 6/30/2020
  - Supersedes end date for 20-06 to 5/22/2020 for actions related to vacant and abandoned properties

  EO 20-33 extends to 7/31/2020; EO 20-39 extends to 8/14/2020

https://www.in.gov/gov/files/EO_20-06.pdf
https://www.in.gov/gov/files/Executive%20Order%2020-28%20(Reopen%20Stage3).pdf

State Specific Moratoriums

Iowa

- Proclamation of Disaster Emergency - Effective 3/22/2020 – 4/16/2020
  - Section 2 - No foreclosure may be initiated and suspends any existing actions until the state of emergency has terminated.
  - Nothing in Proclamation should be construed as relieving any individual of obligation to pay rent, make mortgage payments or comply with any other term of lease, mortgage or other agreement.
- Proclamation of Disaster Emergency – Effective 4/2/2020 – 4/30/2020
  - Section 55 & 56 - No foreclosure or eviction may be initiated and suspends any existing actions until the state of emergency has terminated
  - Any applicable statute of limitations is tolled during that time.
  - Nothing in Proclamation should be construed as relieving any individual of obligation to pay rent, make mortgage payments or comply with any other term of lease, mortgage or other agreement.
- State of Emergency extended through 5/27/2020 (Proclamation 4/2/2020; Proclamation on 4/27/2020)

https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Disaster%20Proclamation%20-%202020.04.02.pdf
https://www.iowacourts.gov/collections/485/files/1076/embedDocument/

Other Midwest State Specific Moratoriums

- Missouri – no state, county or city mandates ever in effect
  - Stay at Home Orders in place until 5/3/2020 did not allow for proceeding with non-judicial sales, service of process for evictions or for completing eviction lockouts.
- Nebraska – Executive Order No. 20-07 – Coronavirus – Temporary Residential Eviction Relief– Effective 3/13/2020 – 5/31/2020
  - Prohibits proceeding to trial in eviction action.
  - Nothing in Order should be construed as relieving any individual of obligation to pay rent or comply with any other term of lease or other agreement.

  http://govdocs.nebraska.gov/docs/pilot/pubs/eofiles/20-07.pdf
- North Dakota – no state, county or city mandates ever in effect
- South Dakota – no state, county or city mandates ever in effect

Remote Signings and Appearances—Here to Stay?

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During Covid-19 Crisis 847-334 6116

Introduction

Almost two years ago, I presented a paper to the Consumer Bankruptcy Commission of the American Bankruptcy Institute. I raised issues that I thought were important to bankruptcy practice for the 21st Century. Little did I know that we would soon be facing the unprecedented challenges of an international pandemic. The bankruptcy system has had to find ways of continuing business through the crisis even though business-as-usual is no longer possible.

For context, I offer you, verbatim, an excerpt of what I presented to the Consumer Bankruptcy Commission.

Expressly authorize use of remote video access for creditors meetings under Section 341 and for court hearings.

Every bankruptcy filer faces the cost of physically traveling to meet his or her bankruptcy trustee. Accordingly, a potential bankrupt located in an area close to a bankruptcy trustee will face lower geographically imposed filing costs compared to a potential bankrupt who lives in an area remote from a bankruptcy trustee. Courts and judges already are well aware of the significant burdens imposed for brief

appearances. Judges in the District of Arizona routinely preside at far-flung locations within that state by remote video. Courts in both the Eastern and Western Districts of Wisconsin permit attorneys to appear for most routine matters by telephone as a matter of course.

Travel to a 341 meeting also should not be an impediment to a debtor receiving bankruptcy relief or impose significant additional costs. Some courts around the country have already eased the burden on debtors' counsel and the United States Trustee by expanding use of videoconferencing for court hearings. The U.S. Bankruptcy Court for the District of Montana has put one such framework in place. With the proper safeguards, there is no reason why the same accommodations cannot be extended to debtors who are in the greatest need of alternate ways to fulfill their obligations without avoidable inconvenience and expense. Some of the features of a possible framework might be:

- authentication at the time of the meeting, such as the debtor answering random questions from a credit report
- presentation of photo identification by video means
- requirement that the debtor's attorney to be present with the debtor and to submission of an affidavit to the trustee attesting that the attorney confirmed the debtor's identity
- imposition of minimum quality requirements for the panel trustee to conduct the meeting

The framework could establish other requirements such as some affidavit or other proof that travel to the 341-meeting location would produce an undue hardship, which should be well-defined and not open to subjective application. A request for

videoconference attendance at a 341 meeting that is more than 100 miles from the debtor's home should be entitled to a presumption of reasonableness and automatically approved through a form-based application. In any event, the bankruptcy system ought to expand access to justice to those individuals who, due to geography or life circumstances, currently must incur significant expense or unreasonable inconvenience in order to get out of debt. Affordable technological solutions already exist. There should be a national framework to implement this. Now, even in the jurisdictions which permit video conferences, the debtor must appear at a local United States Trustee's office, be sworn locally and have identification verified locally. People who appear in court by telephone or video conference don't have to travel to a local courthouse to do so.

Anecdotal evidence suggests that private trustees, with the permission of their local United States Trustee office, will allow for video 341 meetings using technology such as Skype or FaceTime, for debtors who are physically unable to attend a meeting owing to disability or illness. The needs to be served by a 341 meeting or many routine court appearances, such as a reaffirmation hearing, can well be met by means other than a physical, in person appearance, at a remote courthouse. Even taking into consideration localization of meetings, for some places, such as Arizona, meeting locations such as Flagstaff, Bullhead City, Phoenix, Tucson and Prescott still can be hours away from the residence of many debtors. In a state such as Montana, the distances can be even more daunting. Technology can solve this problem and should be utilized.

Authorize and validate authenticated electronic signatures and records.

Debtors' signatures are necessary for them to declare the accuracy of their petition, schedules, statements of financial affairs and other bankruptcy papers. However, the manner in which a debtor may affix a signature is vague and uncertain under the Bankruptcy Code and Rules. Attorneys already sign all documents in the federal system by electronic means. Most states are also adopting electronic filing of documents. Electronic signatures are being adopted as legally binding throughout the world. The United States adopted the Electronic Signatures in Global and National Commerce Act (E-Sign Act) in 2000. Interestingly, the exceptions provided in the E-Sign Act don't appear to relate to bankruptcy. The Uniform Electronic Transactions Act has been adopted by 47 states, the District of Columbia and the United States Virgin Islands. As a result of this Act, physical records of most records are no longer required. Records retention of checks and other legal documents is now permitted and handled electronically. Furthermore, the three states that have not adopted the Uniform Electronic Transactions Act (Illinois, New York and Washington) all have laws authorizing and recognizing electronic signatures as valid and binding.

The idea that "wet signatures" are required in bankruptcy is burdensome and tends to prejudice consumers and delay or defer immediate relief when they need it the most. The perceived harms to be prevented by wet signatures can be addressed equally well by electronic signature authentication routinely utilized in commerce and authorized by the E-Sign Act. Utilization of electronic signatures will allow debtors to promptly and efficiently authenticate and sign not only their bankruptcy petitions but also their statements of financial affairs, declarations, engagement agreements,

amendments to petitions and affidavits or declarations that might be necessary in in their cases. Numerous trips to attorneys' offices - and concomitant days lost from work - will be eliminated. The speed and efficiency of electronic transactions can be incorporated into consumer bankruptcy practice allowing for better service and at reasonable cost.

Just as the courts' paper files have given way to electronic records, attorneys' lateral filing cabinets have given way to electronic records as well, all maintained in the cloud. Paper files and wet signatures are becoming obsolete. Electronic technology will allow for long term record maintenance as well as significantly improved signature authentication than may be permitted by so-called "wet signatures." Electronic signatures are nationally and internationally recognized in virtually all areas of commerce. They should certainly be recognized for all purposes under the Bankruptcy Code.

To the extent that the Bankruptcy Code requires records to be maintained, for example in Section 527(d), the Code should expressly provide that maintenance of such records may be electronic and cloud based.

American Bankruptcy Institute Commission on Consumer Bankruptcy Recommendations

Remote 341 Meetings

The Commission recommends the bankruptcy system should allow trustees, using video technology, to conduct section 341 meetings remotely and should encourage trustees to offer section 341 meetings outside of regular working hours. Attendance at the section 341 meeting, required in every bankruptcy case, can be a burden for poorer debtors who cannot easily take

time off work. In this situation, the bankruptcy process can contribute to the debtor's financial distress instead of alleviating it. Also, in rural areas, the section 341 meeting can require hours of travel that the debtor does not have available or cannot financially afford. Expanded use of video attendance at section 341 meetings requires the balancing of interests of debtors, debtors' attorneys, trustees, and creditors, as well as the overall integrity of the bankruptcy system.[1]

Manuscript "Wet" Signatures or Electronic Signatures of Debtors

The ABI Commission on Consumer Bankruptcy Report is silent on the question of electronic signatures for debtors in bankruptcy.

Practice Prior to COVID-10 National Emergency

From the United States Trustee Program Handbook for Chapter 7 Trustees

> The debtor or, in the case of a partnership or corporation, a designated representative of the partnership or corporation, must attend the meeting of creditors in person, with very limited exceptions as discussed below. This is true even if no creditors attend. Neither the trustee nor the United States Trustee may waive the requirement for the appearance of the debtor at the meeting. When spouses have filed jointly, the Bankruptcy Code requires both debtors to attend the meeting. 11 U.S.C. § 341, Fed.R.Bankr.P. 2003(b).
>
> There may be local rules or United States Trustee procedures which provide alternatives in extenuating circumstances for the debtor's personal appearance at the meeting. The circumstances may include military service, terminal illness, disability, or incarceration. The trustee must comply with these procedures and requirements. 28 U.S.C. § 586, Soldiers and Sailors Relief Act.

[1] American Bankruptcy Institute Commission on Consumer Bankruptcy Final Report and Recommendations at 93 (Part III A recommendation 4) (2019).

From the Bankruptcy Administrator for the Western District of North Carolina

Request to Attend a 341 Meeting by Telephone or Videoconference

Parties may complete the form below to request to attend a 341 meeting by telephone or videoconference. You will receive an email approving or denying your request on the following business day.

Note: Requests must be received by close of business on the day prior to the scheduled 341 meeting.

Practice in light of COVID-19 National Emergency

Chapter 7 341 Meetings

US Trustee Policy as of August 28, 2020

The U.S. Trustee Program has extended the requirement that section 341 meetings be conducted by telephone or video appearance to all cases filed during the period of the President's "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak" issued March 13, 2020, and ending on the date that is 60 days after such declaration terminates. However, the U.S. Trustee may approve a request by a trustee in a particular case to continue the section 341 meeting to an in-person meeting in a manner that complies with local public health guidance, if the U.S. Trustee determines that an in-person examination of the debtor is required to ensure the completeness of the meeting or the protection of estate property. This policy may be revised at the discretion of the Director of the United States Trustee Program.

Bankruptcy Administrator's Continuation of Operations Plan (COOP)

Meetings of creditors held pursuant to 11 U.S.C. § 341 ("341 meetings") for the Western District of North Carolina are be conducted by teleconference or video conference through the COOP period. Similar policies are in place in Alabama, also a Bankruptcy Administrator. jurisdiction.[2]

[2] https://www.alnba.uscourts.gov/

Chapter 13 341 Meetings

Each chapter 13 trustee establishes their own policies for 341 meetings. Survey suggests that most chapter 13 trustees are utilizing telephone conferences much like the United States Trustee Program's system. Some are using video technology using Zoom. Few, if any, are holding meetings in person as of the date of this writing. Chapter 13 meetings in St. Louis are telephonic[3]. All meetings in the Western District of Missouri are telephonic during the COVID-19 emergency.[4] Data concerning Chapter 13 341 meetings in Kansas is not immediately available.

Electronic Signatures

Most, if not all bankruptcy courts in the United States have required "wet signatures" as a part of the bankruptcy process. While there is no provision in the Bankruptcy Code itself addressing either signatures or the type of signatures required in a bankruptcy petition or paper, Federal Rule of Bankruptcy Procedure 9011(a) states:

> (a) SIGNATURE. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Although Rule 9011(a) calls for signatures, nothing in the rule specifies the type of signature that is required. Under the CM/ECF system, all signatures of attorneys are electronic. The utilization of the form /s/ along with the attorney's signature and their

[3] https://www.moeb.uscourts.gov/341meetings
[4] https://www.mow.uscourts.gov/sites/mow/files/BK-2020-go-3.pdf This rule also allows for electronic signatures, a point that will be discussed further below.

CM/ECF log-in is deemed to be a sufficient and binding signature for all purposes. In absence of an express requirement for manuscript "wet" signatures in Rule 9011, most bankruptcy courts have adopted local rules requiring that debtors' signatures be in manuscript and in ink.[5]

Relaxation of Signature Requirements in light of COVID-19

Throughout the nation, bankruptcy courts have been relaxing the requirements for "wet" signatures in response to the COVID-19 national emergency. For illustrative purposes, we prsent the approach taken by bankruptcy courts in Kansas and Missouri. In the Eastern District of Missouri, debtors may sign documents through recognized electronic signature means provided that the attorney and the debtor engage in a prescribed review and verification procedure.[6] The Bankruptcy Court for the Western District of Missouri has not only addressed the question of electronic signatures of documents but also its requirement for in-person meetings between lawyers and clients. Its General Order 3 dated March 23, 2020 provides in part as follows:

> Petitions, lists, schedules, statements, plans, amendments, pleadings, affidavits, and other documents which must contain original wet ink signatures or which require verification under Fed. R. Bankr. P. 1008, or an unsworn declaration as provided in 28 U.S.C. § 1746, may contain, in lieu of the original wet ink signature, the signature forms described below: 1. A copy, or digitally scanned or faxed image, of the original document containing a wet ink signature; or 2. An image with a signature captured electronically at the time of document creation, or signatures created and verified by use of special software programs for electronic signatures, such as DocuSign or Sign Easy. An attorney's electronic filing of such a document with the signature form described above will constitute a certification by the debtor's attorney that (1) the attorney transmitted the entire

[5] E.g. Bankruptcy Court of Kansas LBR 9011-4(b); Bankruptcy Court for the Western District of Missouri LBR 19011-4 (wet signature required for pro-se filers); Bankruptcy Court for the Western District of Missouri LBR 1007-1 requiring maintenance of wet signature on "Declaration re Electronic Filing (Local Form - MOW 1007-1.3); Bankruptcy Court for the Eastern District of Missouri Local Bankruptcy Rule 9011 requiring counsel to obtain wet signatures of debtor prior to filing electronically.

[6] United States Bankruptcy Court for the Eastern District of Missouri General Order 20-4 available at https://www.moeb.uscourts.gov/sites/moeb/files/General_Order_Signatures-During_COVID-19.pdf

> document to the debtor(s) for review and signature, communicated with the debtor regarding the substance and purpose of the document, and received express authorization from the debtor(s) to file the document; and (2) the debtor(s) signed the document and that, at the time of electronic filing, the debtor's attorney is in possession of an image format, facsimile, or software-assisted signature of the document from the debtor(s). Any in-person meeting requirement under the Rights and Responsibilities Agreement is hereby suspended on the condition that debtor's counsel reasonably believes that he or she is complying with all applicable ethical, due diligence, and other requirements in connection with the engagement.[7]

The Bankruptcy Court in the District of Kansas has also dispensed with its "wet signature" requirements of Local Bankruptcy Rule 9011.4(b) during the COVID-19 pandemic and adopted a general order that allows for a scanned image of a manuscript signature or an approved special software signature.[8]

Context – Electronic Signatures

Electronic signatures have become ubiquitous in American legal practice. As stated in my presentation to the ABI Commission on Consumer Bankruptcy, The Electronic Signatures in Global and National Commerce Act (ESIGN), enacted on June 30, 2000, provides a general rule of validity for electronic records and signatures for transactions in or affecting interstate or foreign commerce. ESIGN allows the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing, if the consumer has affirmatively consented to such use and has not withdrawn such consent.[9]

Adobe issued a white paper summarizing the purpose and effect of the ESIGN act. Its

[7] United States Bankruptcy Court for the Western District of Missouri, General Order 20—3 available at: https://www.mow.uscourts.gov/sites/mow/files/BK-2020-go-3.pdf
[8] United States Bankruptcy Court for the District of Kansas Standing Order 20-2 available athttps://www.ksb.uscourts.gov/sites/ksb/files/SO20_2.pdf
[9] ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT, 15 USC §7001 et. seq.

brief summary states:

The ESIGN ACT:

- Satisfies most statutes, that require handwritten signatures on documents
- Allows the contract to be used as evidence in a court of law as long as surrounding processes are well designed and implemented and the usual elements of a contract exist.
- Prevents denial of legal effect, validity or enforceability of an electronically executed document solely because it is in electronic form[10]

Electronic signatures can be authenticated, establish an audit trail and create and maintain a third-party retrieval process. In some respects, an e-signature is even more secure and reliable than a manuscript signature.

In addition to ESIGN, the Uniform Electronic Transactions Act (UETA) has been enacted by all but two states in the United States.[11] The two states that have not enacted UETA have adopted their own electronic signatures acts. [12]

The problem of manuscript or "wet" signatures has proved to be vexatious to the Federal Courts. The Federal Judicial Center issued a study paper entitled 'Bankruptcy Court Rules and Procedures Regarding Electronic Signatures of Persons Other than Filing Attorneys" in 2013.[13] Most stakeholders in the bankruptcy process, particularly prosecutors and chapter 7 trustees objected to the use of electronic signatures for a variety of reasons. It would appear from this report that the Federal Judicial Center sought to achieve some consensus that electronic signatures could be used instead of the manuscript

[10] https://acrobat.adobe.com/content/dam/doc-cloud/en/pdfs/Adobe_E-Sign_Act_WhitePaper_ue.pdfa

[11] https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034

[12] Illinois, 205 ILCS 705/1; New York Electronic Signatures and Records Act, section 310 et seq

[13] Available at: https://www.fjc.gov/sites/default/files/2016/Electronic_Signatures_Report_(FJC2016).pdf

"wet" signature requirement imposed almost universally. However, the report concluded:

> The vast majority of bankruptcy and district courts currently require attorneys to retain hard copies of documents bearing original signatures of non-registrants of CM/ECF. Any rules change that does away with such requirements would alter current practice significantly. Given the input from prosecutors, U.S. trustees, and case trustees, it is possible that requiring a scanned image to be retained, rather than a "wet" or hard copy signature, would be more palatable to many, and would take advantage of some of the benefits of current technology. If the subcommittee proceeds with developing a proposal for submission of a declaration in lieu of retaining hard copies, specific provisions within the proposal should address the following: whether the declaration form is retained by the filing attorney or the clerk of court; whether the declaration is retained in hard copy form or as a scanned image; when the declaration is signed relative to the filing of the documents to which it refers; whether the attorney must also sign the declaration; and the exact attestations the signer makes in signing the declaration.

The COVID-19 Experience

Hearings

A survey of trustees and judges recently conducted reflects that most courts continue to conduct motion practice remotely by telephone. In a few courts, under unusual circumstances, evidentiary hearings might be held in person with stringent distancing and safeguards. Most courts are conducting evidentiary hearings and trials using remote video means such as Zoom for Government. The Bankruptcy Court in Colorado has established a special isolated "Zoom Room" at the courthouse so that persons without video capability by way of telephone or computer might have a remote connection to a court hearing when necessary. Zoom for Government appears to be the medium of choice for the Bankruptcy Court for the Central District of California. It is likely that Zoom for Government will be more widely adopted in the future.

Meetings of creditors are almost universally conducted by the bridge conference telephone system established by the United States Trustee. In isolated instances, trustees

might be utilizing zoom or video technology for 341 meetings. Most debtors' attorneys are verifying the identity of their clients by zoom conference or in person by social distancing at their offices.

The cost of appearing by third party systems such as Court Solutions has proven challenging to many debtors' attorneys because of the relatively low fees and margins for their cases. Trustees have been able to utilize Court Solutions for free. Pro se debtors also are able to utilize Court Solutions for free. Less expensive alternatives continue to be explored by the various courts. Zoom for Government is gaining popularity. Yet Zoom is not available to all debtors without access to video-capable or other computer equipment.

Wet Signatures

The majority of courts have modified their "wet signature" requirements to varying degrees. Most courts will accept an "approved" electronic signature consistent with the ESIGN parameters, such as Docu-Sign or the like. Most bankruptcy courts still evince a discomfort with dispensing with "wet signatures" and many will require some sort of a facsimile of a "wet signature" to be maintained by the debtors' attorney. Yet an electronic signature can be more secure and more easily authenticated than a wet signature. This is illustrated by *In re Cruz,* (Case 18-10208, dkt. 176, Bankr. S.D. Texas August 27, 2020) where the Debtor's attorney was sanctioned and referred to the District Court and State Bar for altering the date on which the Debtor signed her bankruptcy petition, without her permission.

The Future

The current environment of local requirements for "wet signatures" and even "in-

person" meetings between lawyers and clients, not to mention the historical requirement for "in-person" 341 meetings has turned out to be inadequate to address the needs of the public during the COVID-19 public health emergency. The alacrity with which the entire bankruptcy system has adapted to these unprecedented circumstances calls into question the efficacy and indeed the necessity for these "safeguards" in the first place. Commerce of all sorts no longer requires face- to-face, in person contact. Examples of this abound in retail, banking, securities transactions, real estate transactions, education (for example even this continuing legal education presentation) and more. The concept that a consumer bankruptcy lawyer must meet with their client in a face-to -ace meeting in a brick and mortar office is an anachronism and hypocritical where virtually every aspect of the legal profession has clients who deal with their attorneys remotely – even in the consumer space.

An electronic signature through an approved signature authority such as Docu-Sign or Adobe can provide self-authentication even to a greater degree than can a "wet signature" since the "wet signature" can be, for example, a signature that is signed with a blank date and then dated later – this can't happen with an electronic signature. ESIGN and the universally applied uniform state laws concerning electronic signature have facilitated contracts and affairs just as significant as a bankruptcy petition, such as a real estate contracts, execution of various government forms, including tax forms, licenses, mortgage applications and more.

The "wet signature" on bankruptcy papers will come to be seen as an anachronism in bankruptcy filings – soon to go the way of loose change – and for the same reason – the utility of both is diminishing. Every major mortgage servicer, credit card company,

automobile finance company and other creditor entity in the consumer bankruptcy space will deal with their attorneys remotely. In many cases, they do so electronically, without even any human intervention. What is so sacred about shaking hands or seeing a face of a consumer bankruptcy debtor when the same impact can occur through a zoom conference?

Change is overtaking the legal profession in ways that most practitioners don't yet see. The advent of technology is rendering many tasks that traditionally have been performed by lawyers to be obsolete. We see this already in discovery with the use of algorithms and predictive coding. In bankruptcy, many attorneys already rely on importing credit reports into Schedule F by software as a means of automating and authenticating the various debts owed by consumer debtors. Software already automates many processes in the preparation and even the filing of bankruptcy petitions. Automation and technology will inevitably drive down the price of consumer bankruptcy services as they become more available to the consumers.

The bankruptcy system generally has not changed drastically over the years. However, we all ought to recognize that the bankruptcy petition itself is really nothing more than an ordered matrix of data. It should be understood that ordered matrices of data can and will be automated and in due course, the entire body of matrices becomes "big data" that will be used and exploited. The consequences of this remain to be seen. But they will be profound.

SHOULD CONGRESS INCREASE THE CHAPTER 13 DEBT LIMITS?

HEROES Act of 2020

- On May 15, 2020, the United States House of Representatives passed the Heroes Act to "respond[] to the COVID-19 (i.e., coronavirus disease 2019) outbreak and its impact on the economy, public health, state and local governments, individuals, and businesses."
- Contained in the Heroes Act were several bankruptcy provisions, including the following:
  - *EXPANDED ELIGIBILITY FOR CHAPTER 13.—Section 109(e) of title 11, United States Code, is amended—*
    - (A) by striking "$250,000" each place the term appears and inserting "$850,000"; and
    - (B) by striking "$750,000" each place the term appears and inserting "$2,600,000".

Who May Be a Debtor

- Section 109(e) of the Bankruptcy Code (**1994**) provides:
  - *Only an individual **with regular income** that owes, on the date of the filing of the petition, **noncontingent, liquidated, unsecured debts of less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000 . . .** may be a debtor under chapter 13 of this title.*

Who May Be a Debtor (cont'd)

- Section 109(e) of the Bankruptcy Code (**April 1, 2019, adjusted for inflation**) provides:
  - *Only an individual **with regular income** that owes, on the date of the filing of the petition, **noncontingent, liquidated, unsecured debts of less than ~~$250,000~~ $419,275 and noncontingent, liquidated, secured debts of less than ~~$750,000~~ $1,257,850 . . .** may be a debtor under chapter 13 of this title.*

Who May Be a Debtor (cont'd)

- Section 109(e) of the Bankruptcy Code (**with HEROES Act proposed update**) provides:
  - *Only an individual **with regular income** that owes, on the date of the filing of the petition, **noncontingent, liquidated, unsecured debts of less than ~~$250,000~~ ~~$419,275~~ $850,000 and noncontingent, liquidated, secured debts of less than ~~$750,000~~ ~~$1,257,850~~ $2,600,000 . . .** may be a debtor under chapter 13 of this title.*

Legislative History

- Congress enacted the chapter 13 debt limits as part of the Bankruptcy Reform Act of 1978, which expanded chapter 13 eligibility to sole proprietor businesses.
- Prior to the Bankruptcy Reform Act of 1978, only "an individual whose principal income [was] derived from wages, salary, or commissions" was eligible to be a debtor under chapter 13.
- Congress found the alternative of chapter 11 to be "too cumbersome a procedure for the small, self-employed businessman", noting that "[t]o avoid the complexity, many simply liquidate their assets in straight bankruptcy."
- To that end, Congress changed § 109(e) to include all individuals "with regular income."

Legislative History (cont'd)

- As originally enacted, the debt limits for chapter 13 eligibility were $100,000 in noncontingent, liquidated, unsecured debts and $350,000 in noncontingent, liquidated, secured debts.
- These ceilings were expanded by section 108(a) of the Bankruptcy Reform Act of 1994 to $250,000 and $750,000, respectively.
- The 1994 amendments also added section 104, which automatically adjusts the chapter 13 debt limits and other amounts for inflation every three years.
- The next Chapter 13 debt limit adjustment will occur on April 1, 2022.

Why Do We Have Chapter 13 Debt Limits?

- In expanding chapter 13 to business owners, Congress recognized that large businesses might be incentivized file under chapter 13 to avoid chapter 11.
- To keep large businesses from filing chapter 13 cases, Congress established the original debt limits.
  - *See Committee Report from 1978: The bill places dollar limitations on the amount of debts of the proprietor who may use chapter 13, in order to prevent sole proprietors with large businesses from abusing creditors by avoiding chapter 11. The limits create an irrebuttable presumption that chapter 13 is inappropriate for businesses with more than $100,000 in unsecured debt or more than $500,000 in secured debt. There may be businesses within those limits for which relief under chapter 11 is more appropriate than relief under chapter 13. If so, the bill permits conversion of the case to chapter 11.*

2019 Bankruptcy Reforms

- In August of 2019, Congress enacted the first substantive bankruptcy reforms since the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005.
  - *Family Farmer Relief Act*
  - *Small Business Reorganization Act*

Family Farmer Relief Act

- The Family Farmer Relief Act of 2019 raised the chapter 12 operating debt cap from an adjusted $4.4 million to $10 million, allowing more family farmers to seek relief under chapter 12.
- According to the Committee Report, [t]he increase in the debt eligibility limit effectuated by H.R. 2336 reflects the fact that land and equipment values have increased as well as 'the average size of U.S. farming operations.'"

Small Business Reorganization Act (SBRA)

- Enacted in 2019, the SBRA created a new subchapter V to chapter 11 to streamline the bankruptcy process for small business debtors.
- According to the original sponsors of the SBRA, "Chapter 11 in the bankruptcy code was designed for administering complex business reorganizations involving multi-million dollar companies. Though several provisions specifically focus on small business debtors, a significant amount of research shows that Chapter 11 may still create difficulties for small businesses, including high costs, deficits and procedural roadblocks."

Small Business Reorganization Act (SBRA)

- To be eligible for subchapter V, a debtor must meet the definition of a "small business debtor" and elect to be a Subchapter V debtor.
- With its CARES Act amendment in 2020, the Bankruptcy Code section 101(51D) defines a small business debtor as:
  - *[A] person engaged in commercial or business activities (including any affiliate … and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate* ***noncontingent liquidated secured and unsecured debts … in an amount not more than*** ~~***$2,725,625***~~ ***$7,500,000****** *(excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor*

*The CARES Act amendment that includes the increased debt eligibility limits is in effort for one year

ABI Commission's Recommendation

- On May 3, 2019, the ABI Commission on Consumer Bankruptcy issued its report, which including the following proposal with respect to the chapter 13 debt limits:
  - *Congress should amend section 109(e) to provide that an individual is eligible for chapter 13 if the individual has less than $3,000,000 in total noncontingent, liquidated debts, eliminating the distinction between secured and unsecured debts. The new debt limit should continue to be adjusted for inflation according to section 104(a).*
  - *In the case of married persons, Congress should amend section 109(e) so the following rules clearly apply:*
    - If only one spouse files, the debts of the non-filing spouse that are not the liability of the filing spouse should not count against the filing spouse's debt limit. Debts of the filing spouse thus should not be aggregated with the debts of a non-filing spouse.
    - If both spouses file, each should have the benefit of the debt limit. Debts owed by both spouses are counted against each spouse's limit.

BANKRUPTCY FILING STATISTICS

Things Are Down All Over! (AACER bankruptcy filing statistics as reported to the ABI by EPIQ)[1]

	End of July 2020	End of July 2019	End of July 2018
Chapter 7 Filings	232,783	282,852	281,307
Chapter 13 Filings	102,984	165,698	165,061
Other Filings	5,183	4,247	4,075
TOTAL FILINGS	**340,950**	**452,797**	**450,442**

In Other Words….	**National**	**Kansas**
➢ **Chapter 7 Cases have dropped year over year by:**	**17.7%**	**28.4%**
➢ **Chapter 13 Cases have dropped year over year by:**	**37.8%**	**40.6%**
➢ **Total Case filings have dropped year over year by:**	**24.7%**	**33.8%**

Chapter 11 Numbers Are Deceiving (with thanks to Bob Lewis)[2]

- **Most of the "Other Filings" are Chapter 11 Cases**
- **They increased by almost 25% for the period**
- **But, according to Ed Flynn (UST and ABI), the increase is artificial**
- **Between June 29 and August 2, the following filings occurred:**

	Total 11's	Solo/Parent Cases	Child Cases
2020	786	337	449
2019	529	360	169

- **Thus, even chapter 11 cases appear to be decreasing, if you do not "double-count" affiliated cases (though this may be an indication that larger cases are being filed)**

Even Business Filings Appear Down Generally (U.S. Courts Statistics as Published by ABI)[3]

Through the first six months of each year, the following business cases (all chapters) were filed:

- **2020: 11,106**
- **2019: 11,413**
- **2018: 11,148**

[1] https://www.abi.org/newsroom/bankruptcy-statistics
[2] https://www.creditslips.org/creditslips/2020/08/most-of-what-you-read-about-the-bankruptcy-filing-rate-is-wrong.html
[3] https://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/QUARTERLY-BUSINESS-1980-PRESENT.xls++%5BCompatibility+Mode%5D.pdf