

# **BANKRUPTCY <sup>UP</sup>DATE**

## **April 13, 2020**

If someone else would like to receive these <sup>UP</sup>dates, please send an e-mail to [Mary\\_Frederickson@sdb.uscourts.gov](mailto:Mary_Frederickson@sdb.uscourts.gov).

### **Updated Means Testing Data**

The Census Bureau's Median Family Income Data accessible through the [Means Testing page](#) of the U.S. Trustee Program's website has been updated. The U.S. Trustee Program will apply the updated data to cases filed on or after April 1, 2020.

### **Bankruptcy and the COVID-19 Pandemic**

#### **From Judge Nail:**

In response to the COVID-19 pandemic, federal and state laws are being enacted regarding home mortgages and mortgage lenders are offering, on their own, certain mortgage repayment options. The Court urges both the debtor and the creditor, in open chapter 11, 12, and 13 cases, to memorialize any changes to mortgage repayment terms in the debtor's proposed plan in newer cases without a confirmed plan or through a motion to modify the confirmed plan in older cases with a confirmed plan. This will ensure a good record regarding the parties' modification agreement, which may vary from the changes imposed by a particular federal or state law, and will also give Trustee Wein or the debtor in a chapter 12 or a chapter 13 case and the DIP in a chapter 11 case the necessary authority to make the modified payments. If the parties' mortgage

modification agreement includes any forbearance or suspension terms, be specific about what payments are expected from the debtor at the end of that forbearance or suspension period and also include any changes in the interest rate or the escrow account terms.

The procedure for a motion to modify a confirmed plan remains the same and may be found at Bankr. D.S.D. R. 3015-5 for chapter 12 and 13 cases and at Bankr. D.S.D. R. 3019-2 for chapter 11 cases. Of course, in a chapter 11 case the debtor's attorney will first need to glean from the code whether the debtor is eligible to seek a modification.

Similarly, if a chapter 11, 12, or 13 debtor wants to take advantage of the recently enacted legislation suspending student loan payments, the debtor should specifically address that issue in the debtor's proposed plan in newer cases without a confirmed plan or through a motion to modify the confirmed plan in older cases with a confirmed plan. If not otherwise addressed through a modification, in cases with a confirmed plan, Trustee Wein, the chapter 12 or chapter 13 debtor, or the chapter 11 DIP must continue to make the student loan payments as set forth in the confirmed plan.

In response to the pandemic, some chapter 11, 12, or 13 debtors will also find themselves eligible for grants or gifts from public or private entities, including the "rebates" provided under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The CARES Act excludes coronavirus-related payments from the federal government from the definition of "income" in 11 U.S.C. § 101(10A)(B)(ii) and from the definition of "disposable income" under 11 U.S.C. § 1325(b)(2). The impact of CARES Act funds in chapter 11 and chapter 12 will have to be sorted out, as well

as the impact of non-CARES Act funds in all cases. Thus, regarding CARES Act funds in chapter 11 and chapter 12 cases and regarding non-CARES Act funds in chapter 11, 12, and 13 cases, the preferred course is for the debtor to seek court approval before utilizing the gift or grant. All the cards will then be on the table, and the parties in interest and the Court may assess the impact of the funds in each particular case, including whether they become property of the estate under 11 U.S.C. §§ 541, 1115, 1207, or 1306 or disposable income under 11 U.S.C. § 1129(a)(15)(B), which incorporates the definition of disposable income from § 1325(b)(2), or 11 U.S.C. § 1225(b)(1)(B) and (2) and how the funds may alter a debtor's cash flow projections on which the confirmed plan was premised. Many of these issues will get sorted out quickly, but we will need to be intentional in addressing them.

Finally, creditors may have pending relief from stay motions that do not reflect recent federal and state COVID-19 legislation. Debtors and trustees should not assume the Court will *sua sponte* deny such motions. A concerned debtor or trustee still needs to file an objection to the motion, as may be appropriate.

## Link

[Previous Bankruptcy <sup>UP</sup>dates](#)

As always, should you have questions regarding this <sup>UP</sup>date or anything else concerning your dealings with the Court or the Clerk's office, please let us know.