

CAA, Bankruptcy Administration Improvement Act and Consumer Bankruptcy Relief Act (CBRA)

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The Honorable William
H. Brown (Retired)

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This Panel will cover:

- Recent case law under CARES Act
- Bankruptcy Administration Improvement Act of 2020
- Consolidated Appropriation Act Bill
- Consumer Bankruptcy Relief Act S. 4991 (116th Congress)

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Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act")

Enacted March 27, 2020

Sunset March 27, 2021

Potential Extension?



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Recent CARES Act Decisions

- **CARES Act did not permit modification of plan that had not been confirmed before enactment.** In re Roebuck, 618 B.R. 730 (Bankr. W.D. Pa. 2020); In re Drews, 617 B.R. 579 (Bankr. E.D. Mich. 2020)
- **CARES Act permitted modification of plan when debtor had fallen behind in plan payments before enactment.** In re Gilbert, ___ B.R. ___, 2020 WL 5939097 (Bankr. E.D. La. Oct. 6, 2020)

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Bankruptcy Administration Improvement Act of 2020

- Purpose-
 - ensure adequate funding of the United States trustees,
 - supports preservation of existing bankruptcy judgeship,
 - provides long overdue additional compensation for chapter 7 trustees
 - while amending the system to ensure bankruptcy system is self funded at no cost to the taxpayer

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Bankruptcy Administration Improvement Act of 2020

- Passed by both House and Senate. Signed into law January 12, 2021
- The bill (1) provides for distribution of bankruptcy fees made to U.S. Trustee System Fund for the costs of administering payments and trustee compensation, (2) establishes the Chapter 7 Trustee Fund and associated fees, and (3) extends the temporary office of bankruptcy judges in specified judicial districts.
- Per a memo sent out by the EOUST, Chapter 7 Trustees will now receive \$120 per case instead of \$60.

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Bankruptcy Amendments in Consolidated Appropriation Act ("CAA")

Nine Bankruptcy Code Amendments in the CAA

1. CAA amends Bankruptcy Code to permit Paycheck Protection Program "PPP" loans to certain Debtors.

This provision will sunset on December 27, 2022.



Hank Hildebrand



Deb Miller

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Bankruptcy Amendments in CAA

- 2. Modifies 11 USC 525 - No discrimination under CARES Act solely because the person is or was a debtor in a bankruptcy case. Sunsets 12.27.2021
- 3. Extended time for performance under an unexpired non-residential real property lease in a SubChapter V case. Sunsets 12.27.2022
- 4. Extended time to assume or reject an unexpired non-residential real property lease in Chapter 12, 13 and SubChapter V to give debtor or trustee 210 days after the order for relief. Sunsets 12.27.2022

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Bankruptcy Amendments in CAA

- 5. Amends 547 to prohibit debtor or trustee from avoiding payments made by a debtor during 90-day preference period for covered rental arrearages or covered supplier arrearages. Sunsets 12.27.2022
- 6. Amends 366 to prohibit a utility from discontinuing utility services provided individual debtor pays the utility for the period in the 20-day post filing period and continues to make all other post-petition utility payments - even without providing other adequate assurance of payment. Sunsets 12.27.2021.
- 7. Amends 507(d) - a party who pays customs duty on behalf of an importer is subrogated to the governments priority status under 507(b)(8)(F). Sunsets 12.27.2021

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Bankruptcy Amendments in CAA

- 8. Amends 1328 adding subsection (j).
 - (j) **Subject to subsection (d)**, after notice and a hearing, the court **may grant a discharge of debts dischargeable under subsection (a)** to a debtor who has not completed payments to the trustee or a creditor holding a security interest in the principal residence of the debtor if—
 - (1) **the debtor defaults on not more than 3 monthly payments due on a residential mortgage** under section 1322(b)(5) on or after March 13, 2020, to the trustee or creditor caused by a material financial hardship due, directly or indirectly, by the coronavirus disease 2019 (COVID-19) pandemic; or
 - (2)(A) the plan provides for the curing of a default and maintenance of payments on a residential mortgage under section 1322(b)(5); and
 - (B) the debtor has entered into a forbearance agreement or loan modification agreement with the holder or servicer (as defined in section 6(j) of the Real Estate Settlement Procedures Act of 1974 [12 U.S.C. 2605(j)] of the mortgage described in subparagraph (A).
- Sunset- 1 year from date of enactment 12.27.2021

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Do we know what they intended by this section?

- NACBA suggests that this section is to repeal *In re Heinzle*, 511 B.R. 69, W.D. Texas (2014)
- The issue in *Heinzle* was “The question of whether a post-petition mortgage payment is a payment under the plan determines whether delinquent mortgage payments are a material default under the plan, thereby precluding a discharge under § 1328(a).”

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Bankruptcy Amendments in CAA

9. Permits Supplemental POC for CARES forbearance claims and modified 1329 to allow modification of Chapter 13 plan by parties in interest.

- CAA modifies 501 to allow qualified servicers to file a supplemental proof of claim for the forbore payments, even if the claims bar date has passed.
- CAA modifies 1329 that if Debtor fails to modify his plan after the forbearance proof of claim is filed, the bankruptcy court (on its own motion), the U.S. Trustee’s office, the Chapter 13 trustee and/or any party in interest may move for such a modification.

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Fill in this information to identify the case:

Debtor 1: _____

Debtor 2: _____

United States Bankruptcy Court for the _____ District of _____

Case No: _____

Supplement to Proof of Claim- for CARES Forbearance Claim

This Supplemental Proof of Claim is filed in compliance with the requirements of 11 U.S.C. §501(f)(1) as the Debtor was granted a forbearance under the CARES Act (15 U.S.C. 9056 or 9057).

Name of Creditor: _____ Court claim no. (if known): _____

Last 4 digits of any number you use to identify the debtor’s account: _____ Address of Property: _____

PART ONE: Amount of Loan that was not received during Forbearance Period

List of payments not received during forbearance period:

Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____

Total of payments due under the forbearance: _____

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PART TWO- Information About Agreement to Modify or Defer Loan Obligation:

Have the Debtor and servicer entered into an agreement to modify or defer the loan obligation in connection with the forbearance?

Yes. Include the information required by 11 USC 501(f)(2)(B)(i)-(iii) and attach copies of the writing outlining the modification/deferral/forbearance:

- The loan was modified as follows:

- The amount of forbore payments is deferred until:

No. Debtor or their counsel should contact the servicer about the various resolutions that may be available to the Debtor. Please call 1-800-YOU SERVICER or contact us at www.servicer.com/forbearanceresolution. [Add servicer](#)

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PART THREE- Sign here:

The person completing this form must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box:

- I am the creditor.
- I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information and reasonable belief.

Signature: _____ Date: _____
 Print: First name Middle Initial Last Name Title: _____

Company: _____

Address: _____
 Number Street
 City State Zip Code

Contact phone: _____ Email: _____

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Will Debtors in Chapter 13 qualify for loan deferrals or loan modification?

- No. Per FHFA guidelines, unless the homeowner (including chapter 13 debtors) was contractually current as of March 2020 – they are not eligible for a deferral (putting the amounts due at the end of the mortgage). Some mortgages held by private investors may be able to be deferred.
- Per FHFA guidelines, Chapter 13 is seen as a form of "loan modification". As such, few if any Debtors will be able to obtain a loan modification to deal with the forbore payments.

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Senate Bill S4991 Introduced prior Congress

- Bill was co sponsored by Senators Warren, Durbin and Whitehouse
- Bill was read twice and referred to the Committee on the Judiciary
- Stated purpose to:
 - Streamline bankruptcy process, simplify court procedures and lower cost of bankruptcy
 - Create a single chapter consumer bankruptcy that allows consumers greater flexibility while insuring fair treatment for creditors
 - Allow modifications of mortgages on all residences
 - Allow student loan debt to be discharged
 - Reduce the racial, gender and other harmful disparities in the availability accessibility costs and outcomes in the bankruptcy process.

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What happens next to the bill?

- I'm just a bill up on Capital Hill..... Schoolhouse Rock: America - I'm Just a Bill Music Video
- Has to be reintroduced for the 117th Congress
- Bill has to be marked up
- Has to be referred to Committee
- Committee will debate
- Has to be passed out of Committee
- Then Congressional Budget Office will produce a formal cost estimate of the economic impact if the bill passes
- Then voted on by House and Senate- then reconciliation of the two bills



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Congressional "Findings" and Purpose

- | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> • Streamlining process and simplifying procedures • Greater flexibility for debtors • Lowering costs • Pay debtor attorneys through plan • Mortgage modification • Car loan modification • Student loan discharge • Reduce racial and other disparity • Closing wealthy debtor loopholes • Eliminate exemption opt out | <ul style="list-style-type: none"> • Some results of proposed legislation harmful to debtors and creditors • One chapter instead of two, but with multiple plans • Direct pay by debtors • Difficulties for trustees and new liabilities • New "limited proceedings" with new costs and complexity • Increased attorney fees for debtors and creditors with multiple plans • Procedure difficulty for pro se debtors • Automatic stay termination issues |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

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Differences between bill and current law

<p>Warren Bill</p> <ul style="list-style-type: none"> • Debtor files Consumer Bankruptcy- Chapter 10 • Maximum term of plan is 36 months • Debtor files three plans- one for residence, one for all secured creditors and one for the unsecured creditors. • Trustee pays only the unsecured creditor plan • Discharge occurs at confirmation 	<p>Current Bankruptcy Code</p> <ul style="list-style-type: none"> • Debtor files Chapter 7 or Chapter 13 • Term of plan is 36 to 60 months • Debtor has one plan that deals with their real estate, secured creditors, priority and unsecureds • Trustee can disburse all or some of the funds under the plan. • Discharge occurs when plan payments and term is complete
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Residence plans vs. current law

- Warren plan allows Debtor to modify mortgages on their residences.
- Warren plan requires Debtor to provide proof of insurance on vehicles and residences.
- Warren plan vests property free and clear of any claim or interest of any creditor holding a claim provided for by the plan except those not avoided in the plan.
- Warrant plan allows debtor to sell free and clear after tender to creditor—similar to ABI Commission’s recommendation

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Property plan

- Warren plan allows treatment of personal property leases and installment sales as secured claims
- Warren plan may provide for any secured claim other than principal residence claim
- Warren plan allows the cram down of PMSI vehicles purchased less than 90 days before filing- a reduction from 910 car requirement.

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Repayment plan

- Payments up to 36 months or tender non-exempt assets
- Possible installment redemption
- Debtor can modify the amount due under the repayment plan based on a material change in the financial condition of the debtor if the payments would impose a substantial burden on the debtor of dependent of the debtor.
- Debtors can extend the term of their repayment plan for up to 6 months to pay unanticipated attorney's fees.
- Trustee takes fees on disbursement
- Trustee cannot take any action and move to dismiss case unless Debtor is 90 days delinquent
- Amount to unsecured creditors is determined by formula and only if annual income is more than 135% of state median household income

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Requirements for confirmation

Warren's Bill

- Plan complies with the applicable provisions of the title EXCEPT 1022(a)(1) which is the Repayment Plan Section.
- Plan not proposed in bad faith
- Pay the value of non exempt estate property to unsecured creditors
- Debtor is likely to be able to make all payments under the plan and to comply with the plan.
- Require Debtor to be current on post petition DSO amounts.

Current law

- Plan complies with the provisions of the chapter and applicable provisions of the title.
- Plan has to be proposed in "good faith" and not by any means forbidden by law.
- Plan as of effective date, distributes to unsecured claims not less than they would receive if estate liquidated under chapter 7.
- Debtor prove will be able to make all payments under the plan and to comply with the plan
- Require Debtor to be current on post petition DSO amounts.

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Objections to Confirmation

Warren's Bill

- Objections depend on type of plan
- Repayment plan—trustee or unsecured creditor
- Residence plan—only holder of allowed claim secured by principal residence
- Property plan—only holder of allowed secured claim

Current law

- Any party in interest--§ 1324 and Rule 3015(f)
- If trustee of holder of unsecured claim, § 1325(b)

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What are other changes?

- **REMOVED-** the action of the Debtor in filing the petition was in good faith.
- **REMOVED-** Debtor has filed all applicable Federal, State and local tax refunds as required by §1308.
- **ADDED-** Any compensation paid under the plan to the attorney of the Debtor is reasonable and satisfies the requirements of 329(c)
- **ADDED -** If the holder of an allowed secured claim is not impaired under the residence plan or the property plan, they can't object to confirmation.
- **CHANGES** the basis for the interest rate from prime rate (general interest rate) to Current average prime rate offer rate (a mortgage interest basis)
- **OBLIGATIONS** by Debtor under repayment plan can only be enforced by the Trustee except a holder of a claim under 507 or 523 may enforce their own debt.
- Debtors can file a limited proceeding to deal with only a specific secured claim without filing a "general proceeding" and they modify the secured claim treatment but don't get a discharge.

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Exemption Changes

Warren Bill

- Completely new § 522
- No opt out but debtor can choose new § 522 or other Federal, State and local with same domicile as current Code
- Homestead based on Federal mortgage loan limits and debtor's age
- \$30,000 wildcard
- Increased exemptions for dependents

Current Bankruptcy Code

- Opt out
- Debtor can choose, subject to opt out
- Smaller homestead, wildcard and other § 522 exemptions

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Other changes

Warren Bill

- Confirmation binds only Debtor and creditor
- Confirmation of the plan places a lien on the non-exempt equity of estate property.
- All property vested back into debtor at confirmation.
- Automatic stay lifts at confirmation.
- If case dismissed, Trustee enforces the amount due under simple contract in state court

Current Bankruptcy Code

- Confirmation binds all parties including trustees
- Stay may remain in effect until discharge, case closing or dismissal

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New terms of art

Instead of "projected disposable income" - new term "Minimum payment obligation" under §1021(c)(1) is the amount equal to the lesser of the

- A. allowed unsecured claims OR
- B. the sum of the value of the debtor's interest in property of the bankruptcy estate in excess of the allowed secured claims secured by that property plus any exemption under 522(b) plus to the extent that "annual income" exceeds 135% of median family income of the applicable State and family size
 1. if excess is under \$10k, 15% of the excess
 2. if excess is over 10k but less than \$50k, \$1500 plus 45% of the excess over \$10k
 3. if excess is over \$50k but under 100K, \$19,500 plus 75% of the excess over \$50k
 4. if excess is over \$100k then \$58,500 plus 150% of any amount over 100k.

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What does the change mean?

- Debtors make \$15,538.72 a month
- Under means test required to pay \$257,175 over five years
- Under Warren proposal- Debtor pays % on the amount annual income exceeds 135% of median state and household income.
- \$19,500 (50k over median) plus 75% of amt over \$50k
- Total required to pay unsecured creditors over 3 years- \$20,948.81
- Debtors make \$9,621.57 a month
- Under means test required to pay \$7308.60 over 5 years (\$121.81 a month)
- Annual income \$115,458.84
- 135% of median income for household of 4- \$134,532.90
- Under Warren proposal, Debtors pay \$0 to unsecureds as income not above 135% of median

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New term of art

Annual income

The term 'annual income' means—

(A) an amount equal to twice the income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable, derived during the 6-month period ending on the last day of the calendar month immediately preceding the date of the filing of the petition; and

(B) any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis on behalf of the debtor, except that the proceeds from the sale of an asset not in the ordinary course of business shall not be included in annual income.".

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Annual Income Includes

- Social Security Pension
- Social Security Disability
- VA Pensions
- VA Disability
- Tax Refunds
- Adoption Subsidies

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How to calculate "Annual Income"

- Unknown- Section 521 would be amended in Warren's Bill to:
 - Debtor to provide to the Trustee documentation that establishes the debtor's income in one or more of the following:
 - One or more payment advices issued within 60 days of the date of filing that show the debtor's YTD income
 - A copy of the Federal income tax return (or transcript) for the most recent tax year ending before the case was filed.
 - A W-2 form issued by each employer for the prior year.
 - Only if the Annual Income creates a minimum payment obligation does the Debtor have to provide the full 60 days of payment advices.

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If schedule discloses income less than 80% of the annual income

- In absence of actual knowledge of facts to the contrary,
- the debtor's attorney may rely on the Schedule and
- the documentation requirements do not apply and
- The debtor is not required to file the statement of annual income

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Other new provisions of note

- Failure by the debtor to disclose a cause of action in a schedule required to be filed under this section shall not alone be grounds to dismiss a lawsuit brought to enforce the cause of action.
- If Debtor fails to file a tax return that becomes due after the commencement of the case, or fail to obtain a timely extension, the taxing authority may request that the Court enter an order converting or dismissing the case.
- Allows the Debtor to take an exemption if they avoid a transfer or recover a setoff under 544, 545, 547, 548 and 549
- If the Trustee or UST brings a civil action, and wins, they may receive 10 to 25% of the punitive damages in addition to their attorneys fees and costs.
- Time extended from 2 years to 4 years to recover fraudulent transfers.

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Exceptions From Discharge

Warren Bill

- Substantial amendment to § 523
- Including fines, penalties or restitution
- Strikes § 523(a)(8) exception— student loans treated like other unsecured debts for discharge

Current Bankruptcy Code

- Undue hardship test for student loan discharge

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Dismissal – Warren bill Section 1005

- Debtors in Chapter 10 can move to convert or consent to convert to Chapter 11 or 12. Cannot be forced to convert.
- Debtors can be dismissed after notice and a hearing voluntarily or on a motion by a creditors, UST, Trustee or any other party in interest (same as current law)

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Grounds for dismissal-

Warren proposal- no mention of creditors or estate

Current law- what is in best interests of creditors and estate

Language for grounds for dismissal the same in subsections (1) thru (5)

- (6) material default by the debtor with respect to a term of a confirmed plan;
- (7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;
- (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
- (9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a);

Missing grounds subsections (6) thru (9)

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Grounds for dismissal under Warren- “manifest improper use of bankruptcy system”

- What is manifest improper use of bankruptcy system?
 - It is NOT the failure of a debtor to pay an amount greater than the minimum payment obligation.
 - No other definition is provided.

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Effect of dismissal

Warren proposal

Current law

(a) The dismissal of a case shall not—
 (1) bar the discharge, in a later case, of debts that were dischargeable in the case dismissed, except as provided in section 523, 1031, 1141, or 1228; or
 (2) prejudice the debtor with regard to the filing of a subsequent petition, except as provided in **subsection (g) or (h)** of section 109.

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed;
 nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in **section 109(g)** of this title.

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Who may be a Debtor under 109(g)

Warren proposal

- Debt limit \$7,500,000 (higher than current Chapter 13, lower than current Chapter 7)
- No individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days
- if the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case.

Current law

Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if

1. the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
2. the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

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Additional section 109(h)- Warren

Upon motion of a party in interest OR on the Court's own motion - The Court MAY, after notice and hearing, include a restriction on the debtor's eligibility to refile, upon a finding of cause including:

- Willful failure of debtor to abide by orders of the court or
- Propose a plan in chapter 10, 11 or 12 in good faith
- Willful and substantial default by debtor respect to a term of confirmed plan
- Pattern or practice of filing bankruptcy as part of manifestly improper use of bk system
- Willful failure of debtor to appear before court in proper prosecution of case
- Other manifestly improper use of provisions of this title.

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Section 109(h)- Warren continued

- Period of ineligibility for a subsequent case is
 - 180 days from the date of the order unless the court orders otherwise
 - May extend longer- but not to exceed 720 days) only if the Court finds manifestly improper use of the bankruptcy system.
- Court can decrease the period upon showing of changed circumstances or for good cause shown.

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Warren proposal includes Data to be Collected

- Debtor is a case filed under Chapter 13 MAY file the following information:
 - Marital status
 - Age
 - Sex
 - Race
 - Ethnicity
- Just income is not to be part of the public record

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Warren bill establishes Ombuds within CPF

- The Consumer Bankruptcy Ombuds within the CPF to provide timely assistance to individual debtors in bankruptcy.
- The AG and bankruptcy clerks shall disseminate information about the availability and functions of the Ombuds to individual debtors in bankruptcy, consumer bankruptcy attorneys and consumer credit counseling agencies.
- To receive review and attempt to resolve informal complains from individuals in bankruptcy with parties in interest.
- To compile and analyze data on consumer bankruptcy filings including complaints and disparities in the bankruptcy system.
- Annually prepare a report that describes the activities and evaluate the effectiveness of the Ombuds.

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Additional Ombuds requirements

- Ombuds to supervise Higher Cost Lenders of any loan with an annual percentage rate greater than 36%
- Ombuds to investigate violations of the discharge Injunction involving an individual debtor.

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Includes amendments to Fair Debt Collection Practices Act

Adds the following as violations to FDCPA

(9) Filing a lawsuit or a claim in a bankruptcy case that is based on a debt without an actual, reasonable, good-faith belief that the applicable statute of limitations for enforcement of that debt has not expired at the time of filing.

(10) Any act to knowingly collect or attempt to collect a debt that has been discharged in bankruptcy except acceptance of a purely voluntary payment of the debtor without encouragement or coercion by the debt collector.”;
