

Legislative Update

BY CHARISSA POTTS

Key Facts About the SBRA

Editor's Note: *This month's Update includes excerpts from recent ABI educational materials regarding the Small Business Restructuring Act of 2019 (SBRA), prepared by Charissa Potts. See also the feature on p. 28.*

Chapter 11 preserves businesses and jobs while maximizing creditor recoveries. However, small and medium-sized businesses do not enjoy these benefits in practice. Smaller-sized businesses often approach bankruptcy not to save their businesses, but rather knowing that the businesses will not survive. Thus, the Bankruptcy Code is seen as broken and unworkable for these kinds of businesses.

Chapter 11 is not seen as a viable option for smaller businesses because the Code (1) places unrealistic and arbitrary deadlines on small businesses; (2) imposes substantial and costly disclosure requirements; (3) does not provide any tools to help small businesses, whose owners are likely unsophisticated in finance, business plans and restructuring issues; and (4) makes it difficult for small business owners to maintain an ownership interest in their businesses. The SBRA seeks to remedy these issues and provide a viable framework for small business owners to reorganize.



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Summary

New subchapter V to chapter 11 consists of provisions devoted to small business debtors and remediates the issues noted above. Its value is efficiency and low cost (no quarterly U.S. Trustee fees). Estimates from ABI indicate that 40 percent of the chapter 11 filers from 2014-18 could have been eligible under new subchapter V; in some districts, that figure is closer to 60 percent. Here are some highlights of the SBRA:

- Subchapter V is *voluntary and optional* to the debtor. Only the debtor may elect to have the subchapter apply to it. *See* § 103(i).
- Section 101(51)D is amended as to the definition of "*small business debtor*":
 - \$2 million in debt limits (combined secured plus unsecured);
 - * More than 50 percent must arise from the debtor's commercial or business activities;
 - Persons engaged in commercial or business activities, except a person whose primary activity is the business of owning single asset real estate;
- Effective date is Feb. 19, 2020.
- Section 1183 allows the U.S. Trustee to appoint a *standing trustee* (as opposed to an *operating trustee*):

- A trustee performs many of the same duties required of a chapter 12 or 13 standing trustee;
- Requiring such private trustee to monitor the debtor's progress toward confirmation of a reorganization plan.

• Section 1188 requires a status conference to be held not later than 60 days after the entry of the order for relief, which period may be extended if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable. *See* § 1188(b). The phrase "circumstances for which the debtor should not justly be held accountable" can be found in 11 U.S.C. §§ 1221 and 1228, the plan-filing and discharge provisions under chapter 12, and 11 U.S.C. § 1328, the discharge provision under chapter 13. Not later than 14 days before the date of the status conference, the debtor must file and serve on the trustee and all parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization. *See* § 1188(c).

• Under § 1190, *the contents of the plan* need to include a brief history of business operations, a liquidation analysis and projections of payments by the debtor; *the proposed plan may modify the claim secured in real property that is the principal residence of the debtor*, "if the value received in connection with the granting of the security interest was (A) not used primarily to acquire the real property; and (B) used primarily in connection with the small business of the debtor."

- Presumptively, there is *no creditors' committee* under § 1102(a)(3).
- *The absolute-priority rule* is abolished.
- Presumptively, there is *no disclosure statement required to accompany the plan*.
- *Only the debtor may file a plan within 90 days of relief* (but this deadline may be extended by the court if the need for an extension is attributable to circumstances beyond the debtor's control).
- Section 1191 authorizes the court to *confirm a plan* over the objection of the debtor's creditors, provided that such plan does not discriminate unfairly and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan. It contains the following requirements:
 - All projected disposable income of the debtor to be received in the three-year period, but not to exceed five years.

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- No 45-day time limit for plan confirmation;
- With respect to a class of secured claims, the plan meets the requirements of § 1129(b)(2)(A);
- The debtor will be able to make all payments under the plan or there is a reasonable likelihood that the debtor will be able to make all payments under the plan (similar to the feasibility requirement of a chapter 13 plan); and
- The plan provides appropriate remedies, which may include the liquidation of nonexempt assets to protect the holders of claims or interests in the event that the payments are not made. *See* § 1191(c). Thus, if the debtor retains property securing a creditor's claim, the plan may have to provide that such property be surrendered to the secured creditor, or liquidated to satisfy

the claim of the secured creditor, in the event that payments are not made to such creditor under the plan.

- Under § 1182, the court grants a *discharge* after all payments are made pursuant to the confirmed plan.
- Subchapter V also includes two provisions, not limited to small business chapter 11 cases, pertaining to *questionable preferential transfers*. A trustee must consider before commencing an action to recover a preferential transfer that:
 1. a trustee must do due diligence to determine a party's known or reasonably knowable affirmative defenses;
 2. preferential transfer must be commenced in the district where the defendant resides if the amount sought is less than \$25,000 (increase from current limit of \$13,650). **abi**

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