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Subchapter V: A Product of the Small Business Reorganization Act of 2019

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University of Missouri-Kansas City School of Law
Advanced Legal Research Pathfinder

Subchapter V:
A Product of the Small Business Reorganization Act of 2019
By Seth Snyder

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I. INTRODUCTION

a. Overview

The Small Business Reorganization Act of 2019 (SBRA) went into effect on February 19, 2020 to provide small businesses bankruptcy relief that was previously untenable under a traditional chapter 11 reorganization. The SBRA created subchapter V of chapter 11, codified as 11 U.S.C. §§ 1181 – 1195, that is available for small business debtors with debts less than \$2,725,625. The debt limit has been temporarily increased to \$7,500,000 until March 26, 2021 by the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act).

The timing of the new law could not have been better considering how small businesses have been effected by the COVID-19 pandemic in 2020. The subchapter V process streamlines bankruptcy reorganization and rehabilitation in a quick and cost-effective manner that allows debtors to remain in business. Many small businesses will now have the chance to survive when previously their only option was a cost prohibitive traditional chapter 11 bankruptcy that often resulted in dismissal or a conversion to chapter 7 liquidation. Webinar: Small Business Reorganization Act of 2019/Subchapter V (Midwestern Virtual Bankruptcy Institute 2020).

The three principal features of subchapter V are “(1) requiring the appointment of an individual to serve as the trustee in a chapter 11 case filed by a small business debtor, who would perform many of the same duties required of a chapter 12 trustee; (2) requiring such private trustee to monitor the debtor’s progress toward confirmation of a reorganization plan; and (3) authorizing the court to confirm a plan

over the objection of the debtor’s creditors, providing 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.” H.R. REP. NO. 116-171, at 4 (2019).

According to the American Bankruptcy Institutes’ Insolvency 2020 Conference as of October 4, 2020, 1129 cases have proceeded under subchapter V since SBRA became effective on February 19, 2020. That is a rate of over 30 cases per week. With the pandemic still in full swing, SBRA allows small business debtors the opportunity to reorganize their small business and keep the business running.

b. Intended Audience

This pathfinder is intended to provide an overview of the new subchapter V bankruptcy reorganization. It is targeted toward small business owners or attorneys with small business clients in a situation where subchapter V reorganization could provide financial relief and keep the business running. Another potential audience for this pathfinder is a debtor in a pending chapter 11 or 7 bankruptcy that might considering trying a conversion or re-designation to subchapter V. For those in a pending bankruptcy case, consider skipping to the Case Law section and read the case summaries regarding this issue. This pathfinder is intended to be a starting place to learn more about subchapter V and find more comprehensive citable resources for legal research.

II. PRIMARY LAW

a. Small Business Reorganization Act of 2019

From Westlaw - United States Code Annotated Popular Name Table > “Small Business Reorganization Act of 2019”

From Lexis – USCS Popular Names Table > Search “Small Business Reorganization Act of 2019”

The Small Business Reorganization Act of 2019 can be found at Pub.L. 116–54, Aug. 23, 2019, 133 Stat. 1079. Section 2 of the act adds subchapter V at 11 U.S.C. § 1181-95. Section 3 and 4 of the act make changes to other statutes to complement the new subchapter V reorganization. 11 USCS § 547(b) is altered for the purpose of reducing the number of preference actions. 28 USCS § 1409(b) makes a slight change for venue purposes. Neither of these sections will get treatment by this pathfinder. It primarily focuses on subchapter V.

b. The Code

i. § 1181 Inapplicability of Other Sections

Section 1181 identifies which sections of the bankruptcy code apply and do not apply to a subchapter V reorganization. The traditional chapter 11 rules are modified by this section to give qualifying small business debtors a better chance of reorganizing. This section also provides a special rule regarding the debtor’s discharge when a plan is confirmed as a nonconsensual plan under 1191(b).

ii. § 1182 Definitions

This section defines “debtor” as a “small business debtor” which is defined in 11 U.S.C 101(51D). This section also changes the definition of a “debtor in possession” that is applicable in a traditional chapter 11. § 1182(2) defines a subchapter V debtor in possession as the debtor.

- a. CARES Act, Coronavirus Aid, Relief, and Economic Security Act, SEC. 1113. Bankruptcy - Temporarily amended Code § 1182 to increase the debt limit from \$2,725,625 to \$7,500,000 from March 27, 2020 to March 26, 2021.

iii. § 1183 Trustee

Unlike a traditional chapter 11, a trustee is appointed in every subchapter V case. A subchapter V debtor is a debtor in possession so the trustee’s job is to monitor and oversee the debtor’s operation of business. The duties of the trustee are described in this section of the code. The duties of the trustee are expanded if the debtor in possession is removed pursuant to §1185(a).

iv. § 1184 Rights and Powers of a Debtor in Possession

This section describes the rights and powers of a subchapter V debtor in possession, including operation the business. These rights and powers may be modified or limited by the court.

v. §1185 Removal of a Debtor in Possession

This section first in subsection (a) gives the court authority to order that the debtor shall not be a debtor in possession for cause and lists the reasons. If the debtor in possession is removed then the trustee's duties are expanded under § 1183(b)(5). Subsection (b) then gives the court the authority to reinstate the debtor as debtor in possession but offers no guidance as to what circumstances might warrant reinstatement.

vi. § 1186 Property of the Estate

This section defines property of the estate which is virtually the same as the definition for individual chapter 11 debtors and in all cases in chapter 12 and 13. This includes all property specified in § 541 that debtor possesses before filing and acquires before the case is closed, dismissed or converted. It also includes debtor's earnings from the date of commencement of the case until the case is closed, dismissed or converted. The debtor in possession remains in possession of the property of the estate.

vii. § 1187 Duties and Reporting Requirements of Debtors

This section makes applicable to subchapter V the requirements of §308 and certain subsections of § 1116. These sections reference financial information and reports that must be filed in the case. Additional disclosures are necessary if the court orders that §1125(f) apply to the subchapter V debtor.

viii. § 1188 Status Conference

This section requires the Court to conduct a status conference within 60 days of the order for relief. 11 U.S.C § 1188(a). This section also requires the debtor to file a status report 14 days before that status conference. 11 U.S.C. § 1188(c).

ix. § 1189 Filing of the Plan

This section provides that only a subchapter V debtor may file a subchapter V plan, requires the debtor to file a plan within 90 days of the order for relief, and allows the filing deadline to be extended “if the need for the extension is attributable to circumstances for which the debtor should not be justly held accountable.”

x. §1190 Contents of Plan

This section outlines the mandatory requirements and options permitted in a subchapter V plan of reorganization. The plan may include provisions that sell property, retain property, modify an interest rate, waive a default, and many other ways to reorganize the business.

“In some circumstances the debtor may want to propose two plans—one that the debtor hopes will be a consensual plan under section 1191(a) and an alternative “cramdown” plan that can be confirmed under section 1191(b) in the event it is not.” 8 Collier on Bankruptcy P 1190.05 (16th 2020)

xi. § 1191 Confirmation of Plan

This section is one of the crucial changes of subchapter V. This section eliminates the absolute priority rule for subchapter V debtors. 8 Collier on Bankruptcy P 1191.01 (16th 2020). The effect is that a subchapter V debtor can get a reorganization plan confirmed without the acceptance of creditors if the 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.” For a plan to be “fair and equitable” it must meet the chapter 11 requirements of section 1129(b)(2)(A), dealing with secured claims, but as to other classes of claims and interests, the plan may be confirmed if it meets the requirements of section 1191(c)(2) and (3) dealing with the reasonable likelihood of plan success and amount paid by the plan to creditors.

xii. § 1192 Discharge

For subchapter V consensual plans, the chapter 11 discharge is determined by provisions of § 1141, with the exception of 1142(d)(5). For nonconsensual “cramdown” plans, the debtor’s discharge is determined by § 1192. The debtor’s discharge in a subchapter V consensual plan, except as may be provided in the debtor’s plan or in the order confirming the plan, becomes effective upon confirmation of the plan. But the debtor’s discharge in a nonconsensual plan is delayed and the court shall not enter the discharge until after completion by the debtor of all payments due within the first three years of the plan, or such longer period not to exceed five years as fixed by the court.

xiii. § 1193 Modification of Plan

This section replaces § 1127 of a traditional chapter 11 case. It allows for modifications of a reorganization plan before and after confirmation. Only the debtor may propose a plan in subchapter V and only the debtor may modify a plan under this section. This is a departure from chapter 11, 12, and 13 cases where a trustee or unsecured creditor can request a post-confirmation modification. 8 Collier on Bankruptcy P 1193.01 (16th 2020).

xiv. § 1194 Payments

According to this section, the subchapter V trustee will hold onto any payments received prior to confirmation of the reorganization plan until the plan is confirmed. Once the plan is confirmed the trustee will distribute the payments according to the terms of the plan. After confirmation of the plan, the trustee will distribute payments to the creditors for a nonconsensual plan. For a consensual plan, the payments will be distributed to the creditors by the debtor or trustee, determined by terms of the plan.

xv. §1195 Transactions with Professionals

A debtor in possession has the power under section 327 to employ an attorney, accountant, appraiser, auctioneer or other professional person. A professional retained under section 327 must not hold or represent an interest adverse to the estate and must be a disinterested person as that term is defined in section 101(14). This section provides that a professional is not disqualified from being a disinterested person if they hold a pre-petition claim of less than \$10,000. This section is helpful to small businesses because outside of

subchapter V the debtor would have to change attorneys or accountants if that person holds even a small pre-bankruptcy claim against the debtor. 8 Collier on Bankruptcy 1195.01 (16th 2020).

c. Case Law

There are two major issues that courts are now deciding with regard to subchapter V reorganizations.

1. Can existing chapter 11 or chapter 7 debtors re-designate their pending bankruptcy cases to a subchapter V case?

a. Cases allowing re-designation.

i. *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020)

Summary: In response to a judgment of foreclosure and sale of Debtor's bed and breakfast, Debtor filed a petition for chapter 11 in 2018. The Debtor did not get a chapter 11 plan confirmed before the SBRA became effective. After the SBRA became effective, the Debtor amended the petition to designate herself a small business debtor and proceed in subchapter V. The United States Trustee objected to the election of subchapter V raising timing and technical issues. The Court noted the 90 day deadline to file a plan and the 60 day deadline to hold a status conference may be extended if the need for an extension is attributable to circumstances for which the debtor should not be justly held accountable.

Holding: Since there is no prohibition provided by Congress, the Court finds that it is within the Court's discretion to reset the timelines to allow the Debtor to avail herself of the

newly enacted law that was not at her disposal when she filed the Current Case.

Furthermore, the court held re-designation is permitted and deadlines can be extended so long as the vested property rights of creditors will not be impaired (noting creditor may still avail itself of all rights granted under the Code not amended by the SBRA).

ii. *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020)

Summary: The Debtor, who operated a small business, filed for chapter 7 in February of 2020. The Chapter 7 Trustee reported no distribution to creditors, suggesting that the case was a no asset case. In June of 2020, the Debtor motioned the Court to convert to subchapter V. The Court noted Congress's significant concern for providing small business debtors a realistic option for reorganizing and saving their business operations. The Court also looked to the language of subchapter V that permits the debtor to retain its prepetition ownership structure even if creditors are not paid in full.

Holding: The court may extend the 90 day plan deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable, the same standard that governs extension of the 90-day deadline to file a chapter 12 plan under § 1221. The Court finds it appropriate to apply a standard similar to that articulated in *Gullicksrud* (chapter 12 case) to sections 1188(b) and 1189(b) and the facts before it. Not only does that standard align with the Court's understanding of the subchapter V deadlines but it also reflects the plain meaning of the words of the statute. The Court can envision a case in which the circumstances surrounding conversion could weigh against any extension of the deadlines under subchapter V. For example, if the Debtor were manipulating the timing of his original bankruptcy filing and his requested conversion in a manner that

unfairly prejudiced some or all of his creditors, an extension would not be warranted.

Likewise, if the Debtor failed to comply with his obligations under the Code in his original bankruptcy case or commenced his case after the effective date of SBRA and had missed a plan deadline prior to requesting conversion or making a subchapter V election, then perhaps an extension would not be warranted. The Court allowed conversion in this case.

iii. *In re Progressive Solutions, Inc*, 615 B.R. 894 (Bankr. C.D. Cal. 2020).

Significance: The Court found that any practicality and scheduling issues arising from an SBRA designation in a case commenced prior to the effective date of the SBRA, while they might result in redundant hearings or the “procedurally awkward” process of resetting deadlines, did not pose an absolute bar to retroactive application of the SBRA.

b. Cases against re-designation

i. *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fla. 2020)

Summary: After over a year pending in chapter 11, Debtor filed an amended bankruptcy petition in which it elected to proceed under subchapter V. Thus, upon amending its petition to elect to proceed under subchapter V more than a year into its case, Seven Stars immediately put itself in default of the requirements of both Sections 1188(a) and 1189(b).

Holding: To balance the special new powers available to small business debtors, Congress granted creditors a very important protection: the requirement that a subchapter V case proceed expeditiously. Where a debtor elects into subchapter V after expiration of the statutory deadlines, the debtor should justly be held accountable for those circumstances,

because the debtor created them. It was the debtor that made the decision to elect into subchapter V after expiration of these deadlines. No circumstances beyond the debtor's control caused the debtor to make that decision.

Disagreement with *Trepetin*: *Trepetin* concludes that the debtor was not responsible for his inability to meet these deadlines, because his previously-filed Chapter 7 case and the conversion process and its requirements necessarily left him beyond the new deadlines. This Court disagrees with that conclusion. The circumstances in *Trepetin* were entirely within the debtor's control: he filed for Chapter 7 and he elected to convert to chapter 11 and proceed under subchapter V. No external factors – beyond his control – contributed to his inability to comply with these deadlines. That new subchapter V became available after he filed his chapter 7 case is not – in this Court's view – such a circumstance beyond the debtor's control that would justify an extension.

Disagreement with *Ventura*: Although the U.S. Trustee apparently couched its concerns in *Ventura* in terms of “practicality and scheduling issues,” this Court views the U.S. Trustee's arguments in *Ventura* as substantive, textual arguments. Congress purposefully set a short deadline for a debtor to file a plan under subchapter V, and set a very high standard for an extension of that deadline. To excuse a debtor's compliance with these deadlines because they did not previously exist is to effectively pick and choose which provisions of subchapter V should apply to a debtor's case. That could not be what Congress intended; if a debtor elects to proceed under subchapter V, it must comply with all its provisions, including the statutory timelines.

- ii. *In re Double H Transportation LLC*, 614 B.R. 553 (Bankr. W.D. Tex. 2020)

Significance: Allowing debtor to amend its petition 116 days after its original petition date would create a procedural quagmire and likely create “cause” to dismiss the Debtor’s case.

- iii. *In re Wetter*, 620 B.R. 243 (Bankr. W.D. Vir. 2020).

Summary: Debtor filed a chapter 7 petition in July of 2019. On his bankruptcy schedules he claimed as exempt nearly \$1 million in assets owned as tenants by the entirety. The Trustee filed an adversary proceeding alleging that the Debtor’s tenancy by the entirety transfer was a fraudulent conveyance made with the intent to hinder, delay, and defraud his creditors. The debtor then “discovered” that the assets were actually part of a revocable trust, the TBE transfer was a nullity, and the interest was property of the bankruptcy estate. In July of 2020, the Debtor then moved to convert his case to chapter 11 and elect subchapter V.

Holding: The Court sees no reason why a delayed conversion to Subchapter V cannot occur when the Section 1189(b) plan filing deadline can be adjusted by the Court to run from the new election, especially when no party in interest objects and the means and opportunity exist for one to do so. But those are not the circumstances of this case. The objection is raised here. The Debtor has been evasive and misleading. The Debtor has played fast and loose with the facts, and under a “justly accountable” standard, he is not given the benefit of the doubt here. If converted to chapter 11 and subchapter V elected, the Court would decline

to extend the time for the Debtor to file a plan under Section 1189(b) given the Debtor's conduct based on the evidence adduced at trial. Because the Debtor would immediately run afoul of Section 1112(b)(4)(J) if the Motion were granted and the election made, the Court will deny the Motion to Convert.

2. Who falls under the definition of “Small Business Debtor” and consequently is eligible for subchapter V reorganization?

a. *In re Voelker*, 123 B.R. 749, 750 (Bankr. E.D. Mich. 1990).

Significance: “When a debtor’s eligibility to file under a particular chapter of the Bankruptcy Code is challenged, the burden is upon the debtor to establish such eligibility.”

b. *In re Wright*, 2020 WL 2193240 (Bankr. D. S.C. 2020).

Summary: Charles Wright designated that he was a small business debtor in his chapter 11 petition. He was the sole member of an LLC and 49% owner of a corporation. Both were small family businesses that sold off all their assets to partially pay off debts. \$220,882.42 of the remaining unpaid debt of \$395,816.29 was guaranteed by Wright’s personal assets (namely his personal residence). The Court needed to determine whether Wright is “a person engaged in commercial or business activities.”

Holding: Nothing in the § 101(51D) definition of “Small Business Debtor” limits it to a debtor currently engaged in business and an individual who had guaranteed debts of two limited liability companies that were no longer in business could proceed in a subchapter V case. He is “engaged in commercial or business activities” by addressing residual business debt and otherwise meets the remaining requirements under § 101(51D).

d. Rules

On December 5, 2019, the Advisory Committee on Bankruptcy Rules proposed Interim Amendments to the Federal Rules of Bankruptcy Procedure (“Interim Rules”) to address provisions of SBRA for adoption in each judicial district. The proposed Interim Rules reflected changes in response to comments received. ADVISORY COMMITTEE ON BANKRUPTCY RULES, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019),

https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf.

On December 19, 2019, the Committee on Rules of Practice and Procedure approved the Interim Rules, recommended their local adoption. The Executive Committee of the Judicial Conference, acting on an expedited basis on behalf of the Judicial Conference, approved the Interim Rules for distribution to the courts. The Interim Rules are located on the Current Rules of Practice & Procedure page of the U.S. Courts public website (<https://www.uscourts.gov/rules-policies/current-rules-practice-procedure>).

i. Summary of SBRA Interim Amendments to the Federal Rules of Bankruptcy Procedure to Implement SBRA.

The following summary of the interim bankruptcy rules is borrowed from Appendix B to A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019 written by Hon. Paul W. Bonapfel, U.S. Bankruptcy Judge, N.D. Ga. The complete guide is available for free on the [uscourts.gov](https://www.uscourts.gov) website at:

https://www.mow.uscourts.gov/sites/mow/files/BK_judge_bonapfels_guide_to_sbira_revisions.pdf.

Rule 1007(b)(5) – Eliminates requirement for filing statement of current monthly income for individual in a subchapter V case.

Rule 1007(h) – Modifies exceptions to requirement for filing supplemental schedule of property the debtor acquires after the filing of the case, as provided in § 541(a)(5), after the closing of the case. The exception does not apply to a chapter 11 plan confirmed under § 1191(b) (cramdown) and does apply after the discharge of a debtor in a plan confirmed under § 1191(b).

Rules 1015(c), (d), and (e) are renumbered as (d), (e), and (f).

Rule 1020(a) – Provides for election of subchapter V to be included in voluntary petition.

Rule 1020(c) – Eliminates provisions for case to proceed as small business case depending on whether committee of unsecured creditors has been appointed or whether an appointed committee has been sufficiently active.

Rule 1020(d) – Renumbered as Rule 1020(c) and eliminates requirement for service of objection to debtor's classification as a small business (or not) or election of subchapter V (unless committee has been appointed) and instead requires service on 20 largest.

Rule 2009 – permits single trustee in jointly administered case under subchapter V as well as in cases under chapter 7.

Rule 2011—Amends title of rule dealing with unclaimed funds to include cases under Subchapter V. Rule 2012 – makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter in applicable to subchapter V trustee, unless debtor is removed from possession. (Same rule as Chapter 12).

Rule 2015(a)(1) – Makes requirement for chapter 11 trustee to file complete inventory of property of debtor (if court directs) inapplicable to subchapter V trustee.

Rule 2015(a)(5) – Makes requirement for payment of UST fees inapplicable in subchapter V case.

Rule 2015(b) – Rule 2015(b) renumbered as:

Rule 2015(c). New Rule 2015(b) requires debtor in possession in subchapter V case to perform duties of trustee described in Rule 2015(a)(2) through (4) and to file inventory if the court directs. Requires trustee to perform these duties if debtor is removed from possession.

Rule 3014 – Provides for court to determine the date for making of § 1111(b) election by secured creditor in case under subchapter V in which § 1125 provisions for disclosure statement do not apply. (General rule is that election must be made before conclusion of hearing on disclosure statement.) Rule 3016(b) – Makes provisions for disclosure statement applicable only if a disclosure statement is required.

Rule 3016(d) – Makes provisions for use of standard form in “small business case” also applicable to a case under subchapter V case. (Note: under SBRA, a subchapter V case is not a “small business case,” although a subchapter V debtor is a “small business debtor.”)

Rule 3017.1(a) – Permits conditional approval of disclosure statement in subchapter V case in which court has ordered that disclosure statement requirements of § 1125 apply.

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

Rule 3018 – Conforming amendment to take account of new Rule 3017.2 and change in Rule 3017.1.

Rule 3019(c) – New rule 3019(c) provides that request to modify plan after confirmation in subchapter V case is governed by Rule 9014 and that provisions of Rule 3019(b) (procedures for post confirmation modification of plan in individual chapter 11 case) apply.

III. SECONDARY SOURCES

a. Treatises

i. Collier on Bankruptcy, Sixteenth Edition

Chapter 11 BANKRUPTCY CODE, Reorganization > Subchapter V Small Business Debtor Reorganization > Chapter 1180-1195

Collier on Bankruptcy is a treatise that is probably considered the most authoritative treatise on Bankruptcy. It is a comprehensive examination of federal bankruptcy law and

procedures. In addition to treatments on all the chapters of bankruptcy law. Although subchapter V is relatively new, there is already a comprehensive section on the law. It has detailed discussion of each new section of subchapter V as well as an overview of the law.

ii. Norton Bankruptcy Law and Practice 3d

Part II. Analysis of the Bankruptcy Code > Subpart 15. Reorganization: Officers and Administration > Chapter 107. Small Business and Subchapter V Cases > II. Small Business Debtor Reorganization

Westlaw does not provide Collier on Bankruptcy. A good alternative is Norton Bankruptcy Law and Practice. Norton Bankruptcy is updated quarterly and is intended to provide a comprehensive view of bankruptcy law. It also contains a substantial chapter regarding subchapter V reorganization.

iii. Bloomberg Law: Bankruptcy Treatise

Part V: Reorganization > Chapter 198.1-15

As of the writing of this pathfinder, the Bloomberg Law Bankruptcy Treatise does not contain any overview or analysis of subchapter V. The sections of the treatise related to subchapter V are just the language of the statutes themselves.

b. Single Topic Guides

- i. American Bankruptcy Institute, SBRA: A Guide to Subchapter V of the U.S. Bankruptcy Code, 2020 Edition

This single topic guide is available on Bloomberg Law. This guide has a wealth of information about subchapter V and is a valuable resource for those with a Bloomberg Law subscription.

- ii. Hon. Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, 93 Am. Bankr. L.J. 571 (2019).

This 153 page guide is a comprehensive discussion of subchapter V. Not only does it contain in-depth discussion of the relevant code sections, rules, and case law; the appendices are also helpful tools for subchapter V practice. The complete guide is available for free on the uscourts.gov website at

https://www.mow.uscourts.gov/sites/mow/files/BK_judge_bonapfels_guide_to_sbra_revision.pdf.

c. Law Reviews and Journals

- i. Michael C. Blackmon, *Revising the Debt Limit for “Small Business Debtors”*: *The Legislative Half-Measure of the Small Business Reorganization Act*, 14 BROOK. J. CORP. FIN. & COM. L. 339 (2020).

This article discusses how the SBRA is only a half-measure because it could have been broadened the definition of small business debtor to include medium-sized businesses by raising the debt limits. Chapter 11 is notorious for being a poor fit for medium-sized business as well small businesses. The article argues that the debt limit should be raised

from \$2,725,625 to \$7,500,000 to allow more medium-sized business debtors to fall under the protective graces of subchapter V.

- ii. Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AM. BANKR. INST. L. REV. 251 (2020).

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3594656

Creditors will have to develop a new playbook for subchapter V cases. Most scholarship has emphasized debtors' new options, but this article presents an analysis from the perspective of creditors. Of course, creditors are not created equal; strategies will only be useful to creditors with claims substantial enough to justify the investment of time and money. Well-positioned creditors will extract whatever strategic gains they can at the expense of the debtor and of less privileged creditors. The game is multilateral, not simply creditor vs. debtor. The article suggests strategies for variously positioned creditors to protect their interests.

- iii. Adam D. Herring and Walter Theus, *New Laws, New Duties; USTP's Implementation of the HAVEN Act and the SBRA*, 38 AMER. BANKR. INST. J. 12 (Oct. 2019). http://abi-org-corp.s3.amazonaws.com/journals/watch_10-19.pdf

This article discusses The United States Trustee Program and their duties with regard to subchapter V reorganizations. Specifically it addresses their role in the selection, appointment, and monitoring of subchapter V trustees.

d. Legal Encyclopedia

- i. American Jurisprudence 2d – No entries related to subchapter V as of 2020.
- ii. Corpus Juris Secundum – No entries related to subchapter V as of 2020.
- iii. American Law Reports (ALR)

There is only one reference to subchapter V in the American Law Reports as of the time of this pathfinder. Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions as to Claim or Interest in Bankruptcy Proceeding, § 3.3 Eligibility to be a bankruptcy debtor, Cumulative Supplement.

“Debtor who operated bed and breakfast was not judicially estopped from claiming that mortgage debt arose from commercial or business activities, so as to establish that she qualified as small business debtor under subchapter V of Chapter 11, despite contention that she stated in original schedules and in prior bankruptcy filings that she had primarily consumer debt; given hybrid nature of property, it was not clear that debtor's change of description of mortgage debt as business debt was inconsistent with prior description, as she repeatedly referred to property as bed and breakfast in current case, property was integral to business, and debtor was attempting to be clear and forthright in her representations, court took no

specific action in either current or prior case based on description of mortgage as consumer debt, and debtor did not take unfair advantage of mortgagee by changing description of debt, but acted to take advantage of new definition, to attempt to save business. 11 U.S.C.A. § 101(51D)(A). In re Ventura, 615 B.R. 1 (Bankr. E.D. N.Y. 2020).” 85 A.L.R.5th 353 (Originally published in 2001)

e. Institutional Resources

- i. U.S. DEP’T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020),

https://www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/download

This handbook discusses the provisions of the new law, including the legal rights and duties of the debtor and other parties, including the United States Trustee, and focuses specifically on the duties and responsibilities of trustees appointed under subchapter V.

- ii. U.S. DEP’T OF JUSTICE, 3 UNITED STATES TRUSTEE PROGRAM POLICY AND PRACTICES MANUAL: CHAPTER 11 CASE ADMINISTRATION (Feb. 2020),

https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download

Chapter 3-17 of this manual discusses the provisions of the new law, including the legal rights and duties of the debtor and other parties, and the new responsibilities of the United States Trustee. The section will also specifically address changes to subchapter V effected by the CARES Act, effective for cases filed on or after March 27, 2020 and before March 27, 2021.

f. Forms

The new Official Forms are posted on the Forms page of the US Courts website, under the Bankruptcy Forms table. <https://www.uscourts.gov/forms/bankruptcy-forms>

OFFICIAL FORM B309E2 is the form for individuals or joint debtors under subchapter V, and OFFICIAL FORM B309F2 is the form for corporations or partnerships under subchapter V. Existing OFFICIAL FORMS B309E (individuals or joint debtors) and B309F (corporations or partnerships) are renumbered as B309E1 and B309F1. The new forms provide information applicable in subchapter V cases.

g. News

- i. Bob Lawless, *How Many New Small Business Chapter 11s?*, CREDIT SLIPS, Sept. 14, 2019, <https://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html>

This blog post predicts the impact the SBRA will have on bankruptcy filing. The bottom line is that a lot, but not a majority, of chapter 11's will qualify for the new small-

business subchapter. Given the percentages, the new subchapter will hardly be a small niche of the bankruptcy world. Practitioners (and teachers) of bankruptcy law need to become familiar with its provisions.

- ii. David Swan, *The Small Business Reorganization Act: An Enticing Menu Option for Restaurants in Trouble*, MODERN RESTAURANT MANAGEMENT, Nov. 5, 2020, <https://modernrestaurantmanagement.com/the-small-business-reorganization-act-an-enticing-menu-option-for-restaurants-in-trouble/>

This article discusses the impact of the COVID-19 pandemic on the restaurant industry. Now that Paycheck Protection Program funds are running out, the article suggests that subchapter V might be an option for restaurants seeking to stay in business. Restaurants would not be likely to succeed in a traditional chapter 11 reorganization because they don't have the time, manpower, cash, or ability to fund the case.

- iii. American Bankruptcy Institute, SBRA Resources, <https://www.abi.org/sbra>

This portion of the ABI website includes many resources for learning more about the SBRA. It contains links to useful news articles for staying current with the new law. Access is provided for free by joining the ABI mailing list.

IV. LEGISLATIVE HISTORY

Congress.gov>”p116-54”>H.R.3311> H. Rept. 116-171>

<https://www.congress.gov/116/crpt/hrpt171/CRPT-116hrpt171.pdf>

There is a relatively small amount of legislative history for the SBRA because the legislation moved so quickly through bicameralism and presentment. The bill that became the SBRA was introduced in the house on June 18, 2019 and was signed into law by the president on August 23, 2019.

House report 116-171 was submitted by the Committee on the Judiciary. The report describes the purpose of the Small Business Reorganization Act of 2019 as streamlining the bankruptcy process for small business debtors to successfully reorganize and rehabilitate their financial affairs. The act had bipartisan support and quickly moved through the legislative process. This report describes small businesses as the backbone of the American economy.

While small businesses file the majority of chapter 11 cases they are less likely to reorganize than larger businesses. In response to this concern, Congress initially passed legislation in 2005 requiring heightened scrutiny of such cases and streamlining the reorganization process. H.R. Rep. No. 116-171, at 3 (2019). The 2005 legislation was the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23, 59 (2005). That legislation sought to address “the special problems presented by small business cases by instituting a variety of time frames and enforcement mechanisms designed to weed out small business debtors who are not likely to

reorganize. It also requires these cases to be more actively monitored by United States Trustee Program and the bankruptcy courts.’’ H.R. Rep. No. 109–31, at 19 (2005).

Why didn’t the 2005 legislation fix reorganizations for small businesses?

Because of creditor apathy and lack of debtor resources, small business debtors in chapter 11 frequently have difficulty meeting some of the confirmation requirements of section 1129(a), especially section 1129(a)(8) (obtaining plan acceptance by every impaired class), section 1129(a)(9)(A) (paying all administrative claims in full with cash), and section 1129(a)(10) (obtaining the acceptance of at least one impaired class). 8 Collier on Bankruptcy P 1191.01 (16th 2020)

According to House report 116-171:

“Notwithstanding the 2005 Amendments, small business chapter 11 cases continue to encounter difficulty in successfully reorganizing. Based upon their respective reviews of this issue, the NBC and the ABI developed recommendations to improve the reorganization process for small business chapter 11 debtors. H.R. 3311 is largely derived from these recommendations. As the bill’s sponsor, Representative Ben Cline (R–VA), explained at the hearing held by the Subcommittee on Antitrust, Commercial, and Administrative Law on June 25, 2019 at which H.R. 3311 was considered, the legislation allows these debtors ‘to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business’ which ‘not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.’ Unofficial Tr. of Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. On Antitrust, Commercial, & Admin. Law of the H. Comm. On the Judiciary, 116th Cong. 27 (2019) (on file with H. Comm. on the Judiciary staff).

The principal features of H.R. 3311 consist of the following: (1) requiring the appointment of an individual to serve as the trustee in a chapter 11 case filed by a small business debtor, who would

perform many of the same duties required of a chapter 12 trustee; (2) requiring such private trustee to monitor the debtor's progress toward confirmation of a reorganization plan; and (3) authorizing the court to confirm a plan over the objection of the debtor's creditors, providing 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.”

Section 3 of the SBRA also enacts changes relating to prosecution of preference actions under 11 U.S.C. § 547 and to venue for certain proceedings brought by a trustee. These amendments apply in all bankruptcy cases.

H.R. 3311, which became the SBRA, was derived from recommendations to improve small business reorganization by the American Bankruptcy Institute, the National Bankruptcy Conference, the American College of Bankruptcy, and the National Conference of Bankruptcy Judges. The streamlined reorganization process is intended to be quicker and more cost-effective. One of the defining features of the new law is that it gives the court the authority to confirm a plan of reorganization over the objection of the debtor's creditors.

V. CONCLUSION/GOING FORWARD

It is apparent from the legislative history as well as the current global pandemic that the SBRA is a God-send for small businesses. The ability of a small business to reorganize their debts and keep the business running has perhaps never been more necessary. “Subchapter V is tailor-made for small businesses that can survive COVID and come out the other end,” Vincent Ryan, *Small Businesses Embracing Subchapter V Bankruptcies*, CFO MAGAZINE

(October 27, 2020) (quoting Deirdre O'Connor, a managing director at Epiq Global), <https://www.cfo.com/bankruptcy/2020/10/small-businesses-embracing-subchapter-v-bankruptcies/>. Bankruptcy judges and professionals are expecting many more subchapter V filings as Paycheck Protection Program funds are exhausted. *Id.* Bankruptcy professionals and interested small businesses will want to keep an eye out for coming legislation to extend the time period for the temporary \$7.5 million debt limit. Going forward, Subchapter V proceedings could continue to evolve and allow for greater access to the expedited process. However, much depends on how the pandemic and economic changes develop in the coming months.