



AMERICAN
BANKRUPTCY
INSTITUTE

2020 Alexander L. Paskay Memorial Bankruptcy Seminar

Bankruptcy Practice Is Constantly Changing

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Bankruptcy Changes Over Time



Statutory Changes

- Family Farmer's Relief Act of 2019
- National Guard and Reservist Debt Relief Extension Act
- The HAVEN Act
- Subchapter V—Small Business Debtor Reorganization Act

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Family Farmer's Relief Act of 2019

- Increases debt limit to \$10,000,000

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National Guard and Reservist Debt Relief Extension Act

- Extends the existing National Guard and Reservist Debt Relief Act for another 4 years
- The Act creates an exception to the means test's presumption of abuse for certain members of the National Guard and Reserve.

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The HAVEN Act

- Honoring American Veterans in Extreme Need
- Prior to the Act, disability income derived from veteran's pay was counted towards current monthly income ("CMI")
- Treatment of veteran's retirement income versus disability income

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The Small Business Reorganization Act - SBRA

1. Eligibility
2. Removing Hurdles to Reorganization
3. Exception to Absolute Priority Rule
4. Residential Mortgages
5. Exceptions to Discharge
6. Appointment of Trustee

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Struggles of Small Businesses

- According to the House Report on the SBRA, small business debtors are the least likely to successfully reorganize under the bankruptcy code
- According to the ABI Commission to Study the Reform of Chapter 11, “many commentators and practitioners assert that the Bankruptcy Code no longer works to help rehabilitate [small businesses].”

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Eligibility

- Individual or business must be engaged in commercial or business activities
- Primary business activity cannot be ownership of single asset real estate

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Eligibility

- Must not exceed non-contingent, liquidated, secured and unsecured prepetition debt of \$2,725,625



Guggenheim, Ralph, Bonnie Arnold, John Lasseter, Joss Whedon, Tom Hanks, Tim Allen, Robert Gordon, Lee Unkrich, Randy Newman, and John. 2000. *Toy story*. Burbank, LasseterCalif: Disney/Pixar.

Eligibility

- Insider debt not counted
- 50% of debts must have arisen from the debtor's business or commercial activities

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Removing Hurdles to Filing

- No U.S. Trustee fees
- No creditors' committee
- Removes certain restrictions on conflicts for debtors' counsel



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Removing Hurdles to Confirmation

- No competing plans; debtor must propose plan within 90 days of the petition date
- Elimination of disclosure statement
- Debtor can stretch out payment of priority claims over five years
- Do not need impaired accepting class to confirm
- Elimination of absolute priority rule

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Elimination of Absolute Priority Rule

- Allows business owners to retain their interest in business debtor or sole proprietorship
- The SBRA only requires that the Plan:
 - Does not discriminate unfairly
 - Is fair and equitable
 - Provides that all the debtor's projected "disposable income" will be applied to plan payments OR the value of property to be distributed under the plan is not less than the projected disposable income

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No Accepting Impaired Class Required

- Allows debtors to confirm plan WITHOUT an impaired accepting class

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Residential Mortgages



- Small Business Debtor may modify a non-purchase money residential mortgage
- Mortgage loan must have been primarily used for commercial purposes, NOT the acquisition of the property
- Mortgage lender has same protections as other secured creditors

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Exceptions to Discharge

- Small business debtors may be subject to exceptions to discharge in section 523(a)
 - False pretenses, fraud, larceny, embezzlement, etc.
 - Willful and malicious injury

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Consensual 1191(a) versus Non-Consensual 1191(b)

Consensual	Non-Consensual
Discharge on effective date	Discharge on completion of payments
Property reverts in the debtor on the effective date	Property reverts in the debtor on completion of plan payments
Debtor can make post-confirmation plan payments	Trustee makes post-confirmation plan payments
Trustee's services may be terminated upon substantial consummation	Trustee's services continue post-confirmation until all plan payments are made

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Small Business Trustee



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Opportunities for Secured Lenders

- Hypothetical
 - Eligible small business debtor
 - Unfavorable long-term lease with accelerated damages clause
 - Secured credit facility

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Opportunities for Secured Lenders

- Sale of assets as going-concern
 - 363 sale or plan sale
 - Free and clear
- SBRA provides expedited timeline
- No disclosure statement
- Avoid fees and costs to creditors' committee

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Preferences Changes

- Modified venue limits from \$10,000 to \$25,000 to bring an action against a non-insider outside of the district court where the defendant resides
- Forces additional due diligence by trustee



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Bankruptcy Rule Changes

- Rule 4001(c) – “Obtaining Credit” does not apply in chapter 13 cases
- Rule 6007 – Amended specify service requirements for motion to compel trustee or debtor-in-possession to abandon real property and provided 14 day objection deadline

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Bankruptcy Rule Changes

- Rule 9036 – Amended to provide that service on CM/ECF users is completed upon the filing of the paper via CM/ECF. Does not apply to pleadings or papers required to be served under Rule 7004.

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Bankruptcy Rule Changes

- Rule 9037 – public access to a motion to redact is restricted automatically (CM/ECF has been modified to accomplish this—motion can only be viewed by the filer, trustee, and the US trustee).

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Practical Considerations

- May make bankruptcy an option for closely-held business where it wasn't before
 - Elimination of absolute priority rule
 - Stretch-out payment of administrative expenses
- The SBRA may be the first step in expanding eligibility to larger businesses
 - Proposed debt ceiling of \$10 million

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Questions?

Thank you!

**BANKRUPTCY PRACTICE
IS
CHANGING CONSTANTLY**

Panel:

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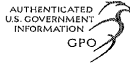
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**2019 Bankruptcy Legislation
August 23, 2019**

1. Honoring American Veterans in Extreme Need (HAVEN) Act
 - Excludes certain disability and death-related benefits payable to service members, veterans and their survivors from the definition of CMI contained in Section 101(10A) of the Bankruptcy Code.
2. Family Farmer Relief Act of 2019
 - Amends Section 101(18) to increase the debt limit for family farmers from \$3,237,000 to \$10,000,000.
3. National Guard and Reservists Debt Relief Extension Act
 - Extends by 4 years the exemption from means test for certain qualifying reservist and National Guard debtors under Section 707(b)(2)(D)(ii) of the Bankruptcy Code.
4. Small Business Reorganization Act of 2019



133 STAT. 1076

PUBLIC LAW 116-52—AUG. 23, 2019

Public Law 116-52
116th Congress

An Act

Aug. 23, 2019
[H.R. 2938]

To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Honoring
American
Veterans in
Extreme Need
Act of 2019.
11 USC 101 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Honoring American Veterans in Extreme Need Act of 2019” or the “HAVEN Act”.

SEC. 2. DEFINITION OF CURRENT MONTHLY INCOME.

Section 101(10A) of title 11, United States Code, is amended by striking subparagraph (B) and inserting the following:

“(B)(i) includes 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 for the household expenses of the debtor or the debtor’s dependents (and in a joint case the debtor’s spouse if not otherwise a dependent); and

“(ii) excludes—

“(I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);

“(II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

“(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism; and

“(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.”.

SEC. 3. DETERMINATION OF BUDGETARY EFFECTS.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled “Budgetary Effects of

PUBLIC LAW 116-52—AUG. 23, 2019

133 STAT. 1077

PAYGO Legislation” for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Approved August 23, 2019.

LEGISLATIVE HISTORY—H.R. 2938:

HOUSE REPORTS: No. 116-169 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 165 (2019):

July 23, considered and passed House.

Aug. 1, considered and passed Senate.





PUBLIC LAW 116–51—AUG. 23, 2019

133 STAT. 1075

Public Law 116–51
116th Congress

An Act

To amend title 11, United States Code, with respect to the definition of “family farmer”.

Aug. 23, 2019
[H.R. 2336]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Family Farmer Relief Act of 2019”.

Family Farmer
Relief Act
of 2019.
11 USC 101 note.

SEC. 2. DEFINITION OF FAMILY FARMER.

Section 101(18) of title 11, United States Code, is amended by striking “\$3,237,000” each place that term appears and inserting “\$10,000,000”.

SEC. 3. DETERMINATION OF BUDGETARY EFFECTS.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled “Budgetary Effects of PAYGO Legislation” for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Approved August 23, 2019.

LEGISLATIVE HISTORY—H.R. 2336:

HOUSE REPORTS: No. 116–182 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 165 (2019):
July 25, considered and passed House.
Aug. 1, considered and passed Senate.

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133 STAT. 1078

PUBLIC LAW 116-53—AUG. 23, 2019

Public Law 116-53
116th Congress

An Act

Aug. 23, 2019
[H.R. 3304]

To exempt for an additional 4-year period, from the application of the means-test presumption of abuse under chapter 7, qualifying members of reserve components of the Armed Forces and members of the National Guard who, after September 11, 2001, are called to active duty or to perform a homeland defense activity for not less than 90 days.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

National Guard
and Reservists
Debt Relief
Extension Act
of 2019.
11 USC 101 note.
11 USC 707 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the “National Guard and Reservists Debt Relief Extension Act of 2019”.

SEC. 2. NATIONAL GUARD AND RESERVISTS DEBT RELIEF AMENDMENT.

Section 4(b) of the National Guard and Reservists Debt Relief Act of 2008 (Public Law 110-438; 122 Stat. 5000) is amended by striking “11-year” and inserting “15-year”.

SEC. 3. DETERMINATION OF BUDGETARY EFFECTS.

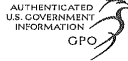
The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled “Budgetary Effects of PAYGO Legislation” for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Approved August 23, 2019.

LEGISLATIVE HISTORY—H.R. 3304:

HOUSE REPORTS: No. 116-170 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 165 (2019):
July 23, considered and passed House.
Aug. 1, considered and passed Senate.

○



PUBLIC LAW 116–54—AUG. 23, 2019

133 STAT. 1079

Public Law 116–54
116th Congress

An Act

To amend chapter 11 of title 11, United States Code, to address reorganization of small businesses, and for other purposes.

Aug. 23, 2019
[H.R. 3311]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Small Business Reorganization Act of 2019”.

Small Business
Reorganization
Act of 2019.
11 USC 101 note.

SEC. 2. REORGANIZATION OF SMALL BUSINESS DEBTORS.

(a) IN GENERAL.—Chapter 11 of title 11, United States Code, is amended by adding at the end the following:

11 USC 1181
prec.

“SUBCHAPTER V—SMALL BUSINESS DEBTOR
REORGANIZATION

“§ 1181. Inapplicability of other sections

11 USC 1181.

“(a) IN GENERAL.—Sections 105(d), 1101(1), 1104, 1105, 1106, 1107, 1108, 1115, 1116, 1121, 1123(a)(8), 1123(c), 1127, 1129(a)(15), 1129(b), 1129(c), 1129(e), and 1141(d)(5) of this title do not apply in a case under this subchapter.

“(b) COURT AUTHORITY.—Unless the court for cause orders otherwise, paragraphs (1), (2), and (4) of section 1102(a) and sections 1102(b), 1103, and 1125 of this title do not apply in a case under this subchapter.

“(c) SPECIAL RULE FOR DISCHARGE.—If a plan is confirmed under section 1191(b) of this title, section 1141(d) of this title shall not apply, except as provided in section 1192 of this title.

“§ 1182. Definitions

11 USC 1182.

“In this subchapter:

“(1) DEBTOR.—The term ‘debtor’ means a small business debtor.

“(2) DEBTOR IN POSSESSION.—The term ‘debtor in possession’ means the debtor, unless removed as debtor in possession under section 1185(a) of this title.

“§ 1183. Trustee

11 USC 1183.

“(a) IN GENERAL.—If the United States trustee has appointed an individual under section 586(b) of title 28 to serve as standing trustee in cases under this subchapter, and if such individual qualifies as a trustee under section 322 of this title, then that individual shall serve as trustee in any case under this subchapter. Otherwise, the United States trustee shall appoint one disinterested person

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PUBLIC LAW 116-54—AUG. 23, 2019

to serve as trustee in the case or the United States trustee may serve as trustee in the case, as necessary.

“(b) DUTIES.—The trustee shall—

“(1) perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a) of this title;

“(2) perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) of this title, if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;

“(3) appear and be heard at the status conference under section 1188 of this title and any hearing that concerns—

“(A) the value of property subject to a lien;

“(B) confirmation of a plan filed under this subchapter;

“(C) modification of the plan after confirmation; or

“(D) the sale of property of the estate;

“(4) ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter;

“(5) if the debtor ceases to be a debtor in possession, perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title, including operating the business of the debtor;

“(6) if there is a claim for a domestic support obligation with respect to the debtor, perform the duties specified in section 704(c) of this title; and

“(7) facilitate the development of a consensual plan of reorganization.

“(c) TERMINATION OF TRUSTEE SERVICE.—

“(1) IN GENERAL.—If the plan of the debtor is confirmed under section 1191(a) of this title, the service of the trustee in the case shall terminate when the plan has been substantially consummated, except that the United States trustee may reappoint a trustee as needed for performance of duties under subsection (b)(3)(C) of this section and section 1185(a) of this title.

Deadline.

“(2) SERVICE OF NOTICE OF SUBSTANTIAL CONSUMMATION.—

Not later than 14 days after the plan of the debtor is substantially consummated, the debtor shall file with the court and serve on the trustee, the United States trustee, and all parties in interest notice of such substantial consummation.

11 USC 1184.

“§ 1184. Rights and powers of a debtor in possession

“Subject to such limitations or conditions as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all functions and duties, except the duties specified in paragraphs (2), (3), and (4) of section 1106(a) of this title, of a trustee serving in a case under this chapter, including operating the business of the debtor.

11 USC 1185.

“§ 1185. Removal of debtor in possession

“(a) IN GENERAL.—On request of a party in interest, and after notice and a hearing, the court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.

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“(b) REINSTATEMENT.—On request of a party in interest, and after notice and a hearing, the court may reinstate the debtor in possession.

“§ 1186. Property of the estate

11 USC 1186.

“(a) INCLUSIONS.—If a plan is confirmed under section 1191(b) of this title, property of the estate includes, in addition to the property specified in section 541 of this title—

“(1) all property of the kind specified in that section that the debtor acquires after the date of commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 of this title, whichever occurs first; and

“(2) earnings from services performed by the debtor after the date of commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 of this title, whichever occurs first.

“(b) DEBTOR REMAINING IN POSSESSION.—Except as provided in section 1185 of this title, a plan confirmed under this subchapter, or an order confirming a plan under this subchapter, the debtor shall remain in possession of all property of the estate.

“§ 1187. Duties and reporting requirements of debtors

11 USC 1187.

“(a) FILING REQUIREMENTS.—Upon electing to be a debtor under this subchapter, the debtor shall file the documents required by subparagraphs (A) and (B) of section 1116(1) of this title.

“(b) OTHER APPLICABLE PROVISIONS.—A debtor, in addition to the duties provided in this title and as otherwise required by law, shall comply with the requirements of section 308 and paragraphs (2), (3), (4), (5), (6), and (7) of section 1116 of this title.

“(c) SEPARATE DISCLOSURE STATEMENT EXEMPTION.—If the court orders under section 1181(b) of this title that section 1125 of this title applies, section 1125(f) of this title shall apply.

Applicability.

“§ 1188. Status conference

11 USC 1188.

“(a) IN GENERAL.—Except as provided in subsection (b), not later than 60 days after the entry of the order for relief under this chapter, the court shall hold a status conference to further the expeditious and economical resolution of a case under this subchapter.

Deadline.

“(b) EXCEPTION.—The court may extend the period of time for holding a status conference under subsection (a) if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

“(c) REPORT.—Not later than 14 days before the date of the status conference under subsection (a), the debtor shall file with the court 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.

“§ 1189. Filing of the plan

11 USC 1189.

“(a) WHO MAY FILE A PLAN.—Only the debtor may file a plan under this subchapter.

“(b) DEADLINE.—The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend the period if the need for the extension

Extension.

133 STAT. 1082

PUBLIC LAW 116-54—AUG. 23, 2019

is attributable to circumstances for which the debtor should not justly be held accountable.

11 USC 1190.

“§ 1190. Contents of plan

“A plan filed under this subchapter—

“(1) shall include—

“(A) a brief history of the business operations of the debtor;

Analysis.

“(B) a liquidation analysis; and

“(C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization;

“(2) shall provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan; and

“(3) notwithstanding section 1123(b)(5) of this title, may modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new 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.

11 USC 1191.

“§ 1191. Confirmation of plan

“(a) TERMS.—The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.

“(b) EXCEPTION.—Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs 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.

“(c) RULE OF CONSTRUCTION.—For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements:

“(1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title.

Time periods.

“(2) As of the effective date of the plan—

“(A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or

“(B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.

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133 STAT. 1083

“(3)(A)(i) The debtor will be able to make all payments under the plan; or

“(ii) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and

“(B) 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.

“(d) DISPOSABLE INCOME.—For purposes of this section, the term ‘disposable income’ means the income that is received by the debtor and that is not reasonably necessary to be expended—

Definition.

“(1) for—

“(A) the maintenance or support of the debtor or a dependent of the debtor; or

“(B) a domestic support obligation that first becomes payable after the date of the filing of the petition; or

“(2) for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.

“(e) SPECIAL RULE.—Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under subsection (b) of this section.

“§ 1192. Discharge

11 USC 1192.

“If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—

“(1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or

“(2) of the kind specified in section 523(a) of this title.

“§ 1193. Modification of plan

11 USC 1193.

“(a) MODIFICATION BEFORE CONFIRMATION.—The debtor may modify a plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123 of this title, with the exception of subsection (a)(8) of such section 1123. After the modification is filed with the court, the plan as modified becomes the plan.

“(b) MODIFICATION AFTER CONFIRMATION.—If a plan has been confirmed under section 1191(a) of this title, the debtor may modify the plan at any time after confirmation of the plan and before substantial consummation of the plan, but may not modify the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123 of this title, with the exception of subsection (a)(8) of such section 1123. The plan, as modified under this subsection, becomes the plan only if circumstances warrant the modification and the court, after notice and a hearing, confirms the plan as modified under section 1191(a) of this title.

133 STAT. 1084

PUBLIC LAW 116-54—AUG. 23, 2019

“(c) CERTAIN OTHER MODIFICATIONS.—If a plan has been confirmed under section 1191(b) of this title, the debtor may modify the plan at any time within 3 years, or such longer time not to exceed 5 years, as fixed by the court, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1191(b) of this title. The plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan, as modified, under section 1191(b) of this title.

“(d) HOLDERS OF A CLAIM OR INTEREST.—If a plan has been confirmed under section 1191(a) of this title, any holder of a claim or interest that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless, within the time fixed by the court, such holder changes the previous acceptance or rejection of the holder.

11 USC 1194.

“§ 1194. Payments

“(a) RETENTION AND DISTRIBUTION BY TRUSTEE.—Payments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor after deducting—

“(1) any unpaid claim allowed under section 503(b) of this title;

“(2) any payment made for the purpose of providing adequate protection of an interest in property due to the holder of a secured claim; and

“(3) any fee owing to the trustee.

“(b) OTHER PLANS.—If a plan is confirmed under section 1191(b) of this title, except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

“(c) PAYMENTS PRIOR TO CONFIRMATION.—Prior to confirmation of a plan, the court, after notice and a hearing, may authorize the trustee to make payments to the holder of a secured claim for the purpose of providing adequate protection of an interest in property.

11 USC 1195.

“§ 1195. Transactions with professionals

“Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title, by a debtor solely because that person holds a claim of less than \$10,000 that arose prior to commencement of the case.”

(b) CLERICAL AMENDMENT.—The table of subchapters at the beginning of chapter 11 of title 11, United States Code, is amended by adding at the end the following:

11 USC 1101
prec.

“SUBCHAPTER V—SMALL BUSINESS DEBTOR REORGANIZATION

“1181. Inapplicability of other sections.

“1182. Definitions.

“1183. Trustee.

“1184. Rights and powers of a debtor in possession.

“1185. Removal of debtor in possession.

“1186. Property of the estate.

“1187. Duties and reporting requirements of debtors.

“1188. Status conference.

“1189. Filing of the plan.

“1190. Contents of plan.

“1191. Confirmation of plan.

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"1192. Discharge.

"1193. Modification of plan.

"1194. Payments.

"1195. Transactions with professionals."

SEC. 3. PREFERENCES; VENUE OF CERTAIN PROCEEDINGS.

(a) **PREFERENCES.**—Section 547(b) of title 11, United States Code, is amended by inserting “, based on reasonable due diligence in the circumstances of the case and taking into account a party’s known or reasonably knowable affirmative defenses under subsection (c),” after “may”.

(b) **VENUE OF CERTAIN PROCEEDINGS.**—Section 1409(b) of title 28, United States Code, is amended by striking “\$10,000” and inserting “\$25,000”.

SEC. 4. CONFORMING AMENDMENTS.

(a) **TITLE 11.**—Title 11, United States Code, is amended—

(1) in section 101—

(A) in paragraph (51C), by inserting “and has not elected that subchapter V of chapter 11 of this title shall apply” after “is a small business debtor”; and

(B) in paragraph (51D)—

(i) in subparagraph (A)—

(I) by striking “or operating real property or activities incidental thereto” and inserting “single asset real estate”; and

(II) by striking “for a case in which” and all that follows and inserting “not less than 50 percent of which arose from the commercial or business activities of the debtor; and”; and

(ii) in subparagraph (B)—

(I) by striking the period at the end and inserting a semicolon;

(II) by striking “does not include any member” and inserting the following: “does not include—“(i) any member”; and

(III) by adding at the end the following:

“(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or

“(iii) any corporation that—

“(I) is subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); and

“(II) is an affiliate of a debtor.”;

(2) in section 103—

(A) by redesignating subsections (i) through (k) as subsections (j) through (l), respectively; and

(B) by inserting after subsection (h) the following:

“(i) Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a small business debtor elects that subchapter V of chapter 11 shall apply.”;

(3) in section 322(a), by inserting “1183,” after “1163.”;

(4) in section 326—

(A) in subsection (a), by inserting “, other than a case under subchapter V of chapter 11” after “7 or 11”; and

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- (B) in subsection (b), by inserting “subchapter V of chapter 11 or” after “In a case under”;
- (5) in section 347—
 - (A) in subsection (a)—
 - (i) by inserting “1194,” after “726,”; and
 - (ii) by inserting “subchapter V of chapter 11,” after “chapter 7,”; and
 - (B) in subsection (b), by inserting “1194,” after “1173,”;
- (6) in section 363(c)(1), by inserting “1183, 1184,” after “1108,”;
- (7) in section 364(a), by inserting “1183, 1184,” after “1108,”;
- (8) in section 523(a), in the matter preceding paragraph (1), by inserting “1192” after “1141,”;
- (9) in section 524—
 - (A) in subsection (a)—
 - (i) in paragraph (1), by inserting “1192,” after “1141,”; and
 - (ii) in paragraph (3), by inserting “1192,” after “523,”;
 - (B) in subsection (c)(1), by inserting “1192,” after “1141,”; and
 - (C) in subsection (d), by inserting “1192,” after “1141,”;
- (10) in section 557(d)(3), by inserting “1183,” after “1104,”;
- (11) in section 1102(a), by striking paragraph (3) and inserting the following:
 - “(3) Unless the court for cause orders otherwise, a committee of creditors may not be appointed in a small business case or a case under subchapter V of this chapter.”; and
- (12) in section 1146(a), by inserting “or 1191” after “1129”.
- (b) TITLE 28.—Title 28 United States Code, is amended—
 - (1) in section 586—
 - (A) in subsection (a)(3), by inserting “(including subchapter V of chapter 11)” after “7, 11”;
 - (B) in subsection (b), by inserting “subchapter V of chapter 11 or” after “cases under” the first place it appears;
 - (C) in subsection (d)(1), by inserting “subchapter V of chapter 11 or” after “cases under” each place that term appears; and
 - (D) in subsection (e)—
 - (i) in paragraph (1), by inserting “subchapter V of chapter 11 or” after “cases under”;
 - (ii) in paragraph (2), by inserting “subchapter V of chapter 11 or” after “cases under” each place that term appears; and
 - (iii) by adding at the end the following:
 - “(5) In the event that the services of the trustee in a case under subchapter V of chapter 11 of title 11 are terminated by dismissal or conversion of the case, or upon substantial consummation of a plan under section 1183(c)(1) of that title, the court shall award compensation to the trustee consistent with services performed by the trustee and the limits on the compensation of the trustee established pursuant to paragraph (1) of this subsection.”;
 - (2) in section 589b—
 - (A) in subsection (a)(1), by inserting “subchapter V of chapter 11 and” after “cases under”; and

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(B) in subsection (d)—

(i) in the matter preceding paragraph (1), by inserting “subchapter V of chapter 11 and” after “trustees under”; and

(ii) in the undesignated matter following paragraph (8), by inserting “subchapter V of chapter 11 and” after “cases under”; and

(3) in section 1930(a)(6)(A), by inserting “, other than under subchapter V,” after “chapter 11 of title 11”.

SEC. 5. EFFECTIVE DATE.

11 USC 101 note.

This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.

SEC. 6. DETERMINATION OF BUDGETARY EFFECTS.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled “Budgetary Effects of PAYGO Legislation” for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Approved August 23, 2019.

LEGISLATIVE HISTORY—H.R. 3311:

HOUSE REPORTS: No. 116-171 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 165 (2019):

July 23, considered and passed House.

Aug. 1, considered and passed Senate.

○

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, DC 20544

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CRIMINAL RULES

DEBRA A. LIVINGSTON
EVIDENCE RULES

October 3, 2019

MEMORANDUM

TO: Honorable David G. Campbell
Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Dennis R. Dow *Dennis R. Dow*
Chair, Advisory Committee on Bankruptcy Rules

RE: REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

On August 1, Congress passed the Small Business Reorganization Act of 2019 ("SBRA") (<https://www.congress.gov/116/bills/hr3311/BILLS-116hr3311eh.pdf>), which creates a new subchapter of chapter 11 for the reorganization of small business debtors. The President signed the legislation on August 23. It will go into effect 180 days after that date, which will be February 19, 2020.

SBRA does not repeal existing chapter 11 provisions regarding small business debtors, but instead it creates an alternative procedure that small business debtors may elect to use. Proceedings using the current chapter 11 provisions will continue to be called "small business cases," while cases for which the new procedure is elected will be called "cases under subchapter V of chapter 11."

The enactment of SBRA requires amendments to be made to a number of bankruptcy rules and forms, in some cases excepting subchapter V cases from provisions that apply generally to chapter 11 and in other cases making provisions expressly applicable to subchapter V cases. Because SBRA will take effect long before the rulemaking process can run its course, the Advisory Committee seeks to have the amended rules issued initially as interim rules for

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Page 2

adoption by each judicial district, and amended and new forms to be issued by the Advisory Committee subject to later approval by the Standing Committee and notice to the Judicial Conference.

At its meeting on September 26, the Advisory Committee voted unanimously to seek approval for publication for public comment of the proposed amended rules and forms and new forms for a period of four weeks beginning the week of October 21. The package for publication consists of eight rules and nine Official Forms. They are included in the appendix to this report. The Advisory Committee approved these rules for publication at its September 26 meeting, subject to revisions that were approved by means of a post-meeting email vote.

Following the publication period, the Advisory Committee anticipates that in November it will consider the rules and forms, with any revisions proposed in response to comments, and that it will vote on the issuance of the rules as interim rules and approval of the forms as Official Forms. Thereafter, the Advisory Committee will seek the Standing Committee's approval of the interim rules and the forms, followed by approval by the Executive Committee of the Judicial Conference of the interim rules and notice to it of the forms amendments. The Advisory Committee intends to proceed on a schedule that will allow distribution of the rules to the judicial districts in time for them to be adopted as local rules or by general order by February 19, 2020. At its spring 2020 meeting, the Advisory Committee will begin the process for the issuance of permanent rules, and it anticipates seeking the Standing Committee's approval at the June meeting for publication of the rules and forms in August 2020.¹

Action Item. The Advisory Committee recommends that the following rule and form amendments and new forms be published for public comment in October 2019:

- Rule 1007(b) and (h),
- Rule 1020,
- Rule 2009,
- Rule 2012(a),
- Rule 2015,
- Rule 3010(b),
- Rule 3011,
- Rule 3016,
- Official Form 101,
- Official Form 201,
- Official Form 309E,
- Official Form 309F,
- Official Form 314,
- Official Form 315,
- Official Form 425A,
- new Official Form 309E2, and
- new Official Form 309F2.

¹ Although the Official Forms will be officially promulgated by February 2020 pursuant to the Advisory Committee's authority to issue conforming Official Form amendments, it intends to seek publication of them under the regular procedure in order to ensure that the public has a thorough opportunity to review them.

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹

1 Rule 1007. Lists, Schedules, Statements, and Other

2 Documents; Time Limits

3 * * * * *

4 (b) SCHEDULES, STATEMENTS, AND OTHER
5 DOCUMENTS REQUIRED.

6 * * * * *

7 (5) An individual debtor in a chapter 11 case
8 (unless under subchapter V) shall file a statement of
9 current monthly income, prepared as prescribed by
10 the appropriate Official Form.

11 * * * * *

12 (h) INTERESTS ACQUIRED OR ARISING
13 AFTER PETITION. If, as provided by § 541(a)(5) of the
14 Code, the debtor acquires or becomes entitled to acquire any
15 interest in property, the debtor shall within 14 days after the

¹ New material is underlined in red; matter to be omitted
is lined through.

16 information comes to the debtor's knowledge or within such
 17 further time the court may allow, file a supplemental
 18 schedule in the chapter 7 liquidation case, chapter 11
 19 reorganization case, chapter 12 family farmer's debt
 20 adjustment case, or chapter 13 individual debt adjustment
 21 case. If any of the property required to be reported under
 22 this subdivision is claimed by the debtor as exempt, the
 23 debtor shall claim the exemptions in the supplemental
 24 schedule. ~~The~~ This duty to file a supplemental schedule ~~in~~
 25 ~~accordance with this subdivision~~ continues even after the
 26 case is closed, except for property acquired after an order is
 27 entered; notwithstanding the closing of the case, except that
 28 ~~the schedule need not be filed in a chapter 11, chapter 12, or~~
 29 ~~chapter 13 case with respect to property acquired after entry~~
 30 ~~of the order~~

31 (1) confirming a chapter 11 plan (other than one
 32 confirmed under § 1191(b)); or

(2) discharging the debtor in a chapter 12 case, or a
chapter 13 case, or a case under subchapter V of
chapter 11 in which the plan is confirmed under
§ 1191(b).

* * * * *

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. As amended, subdivision (b)(5) of the rule includes an exception for subchapter V cases. Because Code § 1129(a)(15) is inapplicable to such cases, there is no need for an individual debtor in a subchapter V case to file a statement of current monthly income.

Subdivision (h) is amended to provide that the duty to file a supplemental schedule under the rule terminates upon confirmation of the plan in a subchapter V case, unless the plan is confirmed under § 1191(b), in which case it terminates upon discharge as provided in § 1192.

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1 **Rule 1020. ~~Small Business~~ Chapter 11 Reorganization**

2 **Case for Small Business Debtors**

3 (a) SMALL BUSINESS DEBTOR

4 DESIGNATION. In a voluntary chapter 11 case, the debtor
 5 shall state in the petition whether the debtor is a small
 6 business debtor and, if so, whether the debtor elects to have
 7 subchapter V of chapter 11 apply. In an involuntary chapter
 8 11 case, the debtor shall file within 14 days after entry of the
 9 order for relief a statement as to whether the debtor is a small
 10 business debtor and, if so, whether the debtor elects to have
 11 subchapter V of chapter 11 apply. ~~Except as provided in~~
 12 ~~subdivision (e), the~~ The status of the case as a small business
 13 case or a case under subchapter V of chapter 11 shall be in
 14 accordance with the debtor's statement under this
 15 subdivision, unless and until the court enters an order finding
 16 that the debtor's statement is incorrect.

17 (b) OBJECTING TO DESIGNATION. ~~Except as~~
 18 ~~provided in subdivision (e), the~~ The United States trustee or

19 a party in interest may file an objection to the debtor's
20 statement under subdivision (a) no later than 30 days after
21 the conclusion of the meeting of creditors held under
22 § 341(a) of the Code, or within 30 days after any amendment
23 to the statement, whichever is later.

24 ~~(e) — APPOINTMENT OF COMMITTEE OF~~
25 ~~UNSECURED CREDITORS. If a committee of unsecured~~
26 ~~creditors has been appointed under § 1102(a)(1), the case~~
27 ~~shall proceed as a small business case only if, and from the~~
28 ~~time when, the court enters an order determining that the~~
29 ~~committee has not been sufficiently active and~~
30 ~~representative to provide effective oversight of the debtor~~
31 ~~and that the debtor satisfies all the other requirements for~~
32 ~~being a small business. A request for a determination under~~
33 ~~this subdivision may be filed by the United States trustee or~~
34 ~~a party in interest only within a reasonable time after the~~
35 ~~failure of the committee to be sufficiently active and~~
36 ~~representative. The debtor may file a request for a~~

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37 ~~determination at any time as to whether the committee has~~
38 ~~been sufficiently active and representative.~~

39 (d~~c~~) PROCEDURE FOR OBJECTION OR
40 DETERMINATION. Any objection or request for a
41 determination under this rule shall be governed by Rule 9014
42 and served on: the debtor; the debtor's attorney; the United
43 States trustee; the trustee; the creditors included on the list
44 filed under Rule 1007(d) or, if any a committee has been
45 appointed under § 1102(a)(3), the committee or its
46 authorized agent, ~~or, if no committee of unsecured creditors~~
47 ~~has been appointed under § 1102, the creditors included on~~
48 ~~the list filed under Rule 1007(d);~~ and any other entity as the
49 court directs.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019 ("SBRA"), Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The title and subdivision (a) of the rule are amended to include that option and to require a small business debtor to state in its voluntary petition, or in a statement filed within 14 days after the order for relief is

entered in an involuntary case, whether it elects to proceed under subchapter V.

Former subdivision (c) of the rule is deleted because the existence or level of activity of a creditors' committee is no longer a criterion for small-business-debtor status. The SBRA eliminated that portion of the definition of "small business debtor" in § 101(51D) of the Code.

Former subdivision (d) is redesignated as subdivision (c), and the list of entities to be served is revised to reflect that in most small business and subchapter V cases there will not be a committee of creditors.

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1 **Rule 2009. Trustees for Estates When Joint**
2 **Administration Ordered**

3 (a) ELECTION OF SINGLE TRUSTEE FOR
4 ESTATES BEING JOINTLY ADMINISTERED. If the
5 court orders a joint administration of two or more estates
6 under Rule 1015(b), creditors may elect a single trustee for
7 the estates being jointly administered, unless the case is
8 under subchapter V of chapter 7 or subchapter V of chapter
9 11 of the Code.

10 (b) RIGHT OF CREDITORS TO ELECT
11 SEPARATE TRUSTEE. Notwithstanding entry of an order
12 for joint administration under Rule 1015(b), the creditors of
13 any debtor may elect a separate trustee for the estate of the
14 debtor as provided in § 702 of the Code, unless the case is
15 under subchapter V of chapter 7 or subchapter V of chapter
16 11 of the Code.

17 (c) APPOINTMENT OF TRUSTEES FOR
18 ESTATES BEING JOINTLY ADMINISTERED.

19 (1) *Chapter 7 Liquidation Cases.* * * * * *

20 (2) *Chapter 11 Reorganization Cases.* If the

21 appointment of a trustee is ordered or is required by

22 the Code, the United States trustee may appoint one

23 or more trustees for estates being jointly

24 administered in chapter 11 cases.

25 * * * * *

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. In a case under that subchapter, § 1183 of the Code requires the United States trustee to appoint a trustee, so there will be no election. Accordingly, subdivisions (a) and (b) of the rule are amended to except cases under subchapter V from their coverage. Subdivision (c)(2), which addresses the appointment of trustees in jointly administered chapter 11 cases, is amended to make it applicable to cases under subchapter V.

1 **Rule 2012. Substitution of Trustee or Successor**

2 **Trustee; Accounting**

3 (a) TRUSTEE. If a trustee is appointed in a chapter
 4 11 case (other than under subchapter V), or the debtor is
 5 removed as debtor in possession in a chapter 12 case or a
 6 case under subchapter V of chapter 11, the trustee is
 7 substituted automatically for the debtor in possession as a
 8 party in any pending action, proceeding, or matter.

9 * * * * *

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (a) of the rule is amended to include any case under that subchapter in which the debtor is removed as debtor in possession under § 1185 of the Code.

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1 **Rule 2015. Duty to Keep Records, Make Reports, and**
 2 **Give Notice of Case or Change of Status**

3 (a) TRUSTEE OR DEBTOR IN POSSESSION. A
 4 trustee or debtor in possession shall:

5 (1) in a chapter 7 liquidation case and, if the
 6 court directs, in a chapter 11 reorganization case
 7 (other than under subchapter V), file and transmit to
 8 the United States trustee a complete inventory of the
 9 property of the debtor within 30 days after qualifying
 10 as a trustee or debtor in possession, unless such an
 11 inventory has already been filed;

12 (2) keep a record of receipts and the
 13 disposition of money and property received;

14 (3) file the reports and summaries required by
 15 § 704(a)(8) of the Code, which shall include a
 16 statement, if payments are made to employees, of the
 17 amounts of deductions for all taxes required to be

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18 withheld or paid for and in behalf of employees and
19 the place where these amounts are deposited;

20 (4) as soon as possible after the
21 commencement of the case, give notice of the case to
22 every entity known to be holding money or property
23 subject to withdrawal or order of the debtor,
24 including every bank, savings or building and loan
25 association, public utility company, and landlord
26 with whom the debtor has a deposit, and to every
27 insurance company which has issued a policy having
28 a cash surrender value payable to the debtor, except
29 that notice need not be given to any entity who has
30 knowledge or has previously been notified of the
31 case;

32 (5) in a chapter 11 reorganization case (other
33 than under subchapter V), on or before the last day
34 of the month after each calendar quarter during
35 which there is a duty to pay fees under 28 U.S.C.

36 § 1930(a)(6), file and transmit to the United States
37 trustee a statement of any disbursements made
38 during that quarter and of any fees payable under 28
39 U.S.C. § 1930(a)(6) for that quarter; and
40 (6) in a chapter 11 small business case, unless
41 the court, for cause, sets another reporting interval,
42 file and transmit to the United States trustee for each
43 calendar month after the order for relief, on the
44 appropriate Official Form, the report required by
45 § 308. If the order for relief is within the first 15 days
46 of a calendar month, a report shall be filed for the
47 portion of the month that follows the order for relief.
48 If the order for relief is after the 15th day of a
49 calendar month, the period for the remainder of the
50 month shall be included in the report for the next
51 calendar month. Each report shall be filed no later
52 than 21 days after the last day of the calendar month
53 following the month covered by the report. The

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54 obligation to file reports under this subparagraph
55 terminates on the effective date of the plan, or
56 conversion or dismissal of the case.

57 (b) TRUSTEE, DEBTOR IN POSSESSION, AND
58 DEBTOR IN A CASE UNDER SUBCHAPTER V OF
59 CHAPTER 11. In a case under subchapter V of chapter 11,
60 the debtor in possession shall perform the duties prescribed
61 in (a)(2)–(4) and, if the court directs, shall file and transmit
62 to the United States trustee a complete inventory of the
63 debtor’s property within the time fixed by the court. If the
64 debtor is removed as debtor in possession, the trustee shall
65 perform the duties of the debtor in possession prescribed in
66 this subdivision (b). The debtor shall perform the duties
67 prescribed in (a)(6).

68 (~~b~~) CHAPTER 12 TRUSTEE AND DEBTOR IN
69 POSSESSION. In a chapter 12 family farmer’s debt
70 adjustment case, the debtor in possession shall perform the
71 duties prescribed in clauses (2)–(4) of subdivision (a) of this

72 rule and, if the court directs, shall file and transmit to the
73 United States trustee a complete inventory of the property of
74 the debtor within the time fixed by the court. If the debtor is
75 removed as debtor in possession, the trustee shall perform
76 the duties of the debtor in possession prescribed in this
77 ~~paragraph~~ subdivision (c).

78 (ed) CHAPTER 13 TRUSTEE AND
79 DEBTOR.

80 (1) *Business Cases*. In a chapter 13
81 individual's debt adjustment case, when the debtor is
82 engaged in business, the debtor shall perform the
83 duties prescribed by clauses (2)–(4) of subdivision
84 (a) of this rule and, if the court directs, shall file and
85 transmit to the United States trustee a complete
86 inventory of the property of the debtor within the
87 time fixed by the court.

88 (2) *Nonbusiness Cases*. In a chapter 13
89 individual's debt adjustment case, when the debtor is

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90 not engaged in business, the trustee shall perform the
91 duties prescribed by clause (2) of subdivision (a) of
92 this rule.

93 (~~de~~) FOREIGN REPRESENTATIVE. In a case in
94 which the court has granted recognition of a foreign
95 proceeding under chapter 15, the foreign representative shall
96 file any notice required under § 1518 of the Code within 14
97 days after the date when the representative becomes aware
98 of the subsequent information.

99 (~~ef~~) TRANSMISSION OF REPORTS. In a chapter
100 11 case the court may direct that copies or summaries of
101 annual reports and copies or summaries of other reports shall
102 be mailed to the creditors, equity security holders, and
103 indenture trustees. The court may also direct the publication
104 of summaries of any such reports. A copy of every report or
105 summary mailed or published pursuant to this subdivision
106 shall be transmitted to the United States trustee.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (b) is amended to prescribe the duties of a debtor in possession, trustee, and debtor in a subchapter V case. Those cases are excepted from subdivision (a) because, unlike other chapter 11 cases, there will generally be both a trustee and a debtor in possession. Subdivision (b) also reflects that § 1187 of the Code prescribes reporting duties for the debtor in a subchapter V case.

Former subdivisions (b), (c), (d), and (e) are redesignated (c), (d), (e), and (f) respectively.

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18 FEDERAL RULES OF BANKRUPTCY PROCEDURE

1 Rule 3010. Small Dividends and Payments in Cases
 2 Under Chapter 7 Liquidation, Subchapter V of Chapter
 3 11, Chapter 12 Family Farmer's Debt Adjustment, and
 4 Chapter 13 Individual's Debt Adjustment Cases

5 * * * * *

6 (b) CASES UNDER SUBCHAPTER V OF
 7 CHAPTER 11, CHAPTER 12, AND CHAPTER 13
 8 CASES. In a case under subchapter V of chapter 11, chapter
 9 12, or chapter 13, ~~case~~ no payment in an amount less than
 10 \$15 shall be distributed by the trustee to any creditor unless
 11 authorized by local rule or order of the court. Funds not
 12 distributed because of this subdivision shall accumulate and
 13 shall be paid whenever the accumulation aggregates \$15.
 14 Any funds remaining shall be distributed with the final
 15 payment.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter

V of chapter 11. To avoid the undue cost and inconvenience of distributing small payments, the title and subdivision (b) are amended to include subchapter V cases.

- 1 Rule 3011. Unclaimed Funds in Cases Under Chapter 7
2 Liquidation, Subchapter V of Chapter 11, Chapter 12
3 Family Farmer's Debt Adjustment, and Chapter 13
4 Individual's Debt Adjustment Cases

5 The trustee shall file a list of all known names and
6 addresses of the entities and the amounts which they are
7 entitled to be paid from remaining property of the estate that
8 is paid into court pursuant to § 347(a) of the Code.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The rule is amended to include such cases because § 347(a) of the Code applies to them.

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(b) DISCLOSURE STATEMENT. In a chapter 9 or chapter 11 case, a disclosure statement, if required under § 1125 of the Code, or evidence showing compliance with § 1126(b) shall be filed with the plan or within a time fixed by the court, unless the plan is intended to provide adequate information under § 1125(f)(1). If the plan is intended to provide adequate information under § 1125(f)(1), it shall be so designated, and Rule 3017.1 shall apply as if the plan is a disclosure statement.

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18 (d) STANDARD FORM SMALL BUSINESS
19 DISCLOSURE STATEMENT AND PLAN. In a small
20 business case or a case under subchapter V of chapter 11, the
21 court may approve a disclosure statement and may confirm
22 a plan that conform substantially to the appropriate Official
23 Forms or other standard forms approved by the court.

Committee Note

The rule is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Subdivision (b) of the rule is amended to reflect that under § 1181(b) of the Code, § 1125 does not apply to subchapter V cases (and thus a disclosure statement is not required) unless the court for cause orders otherwise. Subdivision (d) is amended to include subchapter V cases as ones in which Official Forms are available for a reorganization plan and, when required, a disclosure statement.

Fill in this information to identify the case:

Debtor Name _____
 United States Bankruptcy Court for the: _____ District of _____
 (State)
 Case number: _____

☐ Check if this is an amended filing

Official Form 425A

Plan of Reorganization for Small Business Under Chapter 11

02/20

[Name of Proponent] 's Plan of Reorganization, Dated [Insert Date]

[If this plan is for a small business debtor under Subchapter V, 11 U.S.C. § 1190 requires that it include "(A) a brief history of the business operations of the debtor; (B) a liquidation analysis; and (C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization." The Background section below may be used for that purpose. Otherwise, the Background section can be deleted from the form, and the Plan can start with "Article 1, Summary"]

Background for Cases Filed Under Subchapter V

A. Description and History of the Debtor's Business

The Debtor is a [corporation, partnership, etc.]. Since [insert year operations commenced], the Debtor has been in the business of _____. [Describe the Debtor's business].

B. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to the Plan as Exhibit ____.

C. Ability to make future plan payments and operate without further reorganization

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments and operate the debtor's business.

The Plan Proponent has provided projected financial information as Exhibit ____.

The Plan Proponent's financial projections show that the Debtor will have projected disposable income (as defined by § 1191(d) of the Bankruptcy Code) for the period described in § 1191(c)(2) of \$ _____.

The final Plan payment is expected to be paid on _____.

[Summarize the numerical projections, and highlight any assumptions that are not in accord with past experience. Explain why such assumptions should now be made.]

You should consult with your accountant or other financial advisor if you have any questions pertaining to these projections.

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Debtor Name _____

Case number _____

Article 1: Summary

This Plan of Reorganization (the *Plan*) under chapter 11 of the Bankruptcy Code (the *Code*) proposes to pay creditors of [insert the name of the Debtor] (the *Debtor*) from [Specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income].

This Plan provides for:

	classes of priority claims;
	classes of secured claims;
	classes of non-priority unsecured claims; and
	classes of equity security holders.

Non-priority unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately cents on the dollar. This Plan also provides for the payment of administrative and priority claims.

All creditors and equity security holders should refer to Articles 3 through 6 of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)

Article 2: Classification of Claims and Interests

- 2.01 **Class 1** All allowed claims entitled to priority under § 507(a) of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3).] and priority tax claims under § 507(a)(8)).
[Add classes of priority claims, if applicable]
- 2.02 **Class 2** The claim of to the extent allowed as a secured claim under § 506 of the Code.
[Add other classes of secured creditors, if any. *Note:* Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]
- 2.03 **Class 3** All non-priority unsecured claims allowed under § 502 of the Code.
[Add other classes of unsecured claims, if any.]
- 2.04 **Class 4** Equity interests of the Debtor. [If the Debtor is an individual, change this heading to *The interests of the individual Debtor in property of the estate.*]

Article 3: Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees

- 3.01 **Unclassified claims** Under section § 1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code.] and priority tax claims are not in classes.
- 3.02 **Administrative expense claims** Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code.] will be paid in full on the effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.
- 3.03 **Priority tax claims** Each holder of a priority tax claim will be paid [Specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].
- 3.04 **Statutory fees** All fees required to be paid under 28 U.S.C. § 1930 that are owed on or before the

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effective date of this Plan have been paid or will be paid on the effective date.

- 3.05 **Prospective quarterly fees** All quarterly fees required to be paid under 28 U.S.C. § 1930(a)(6) or (a)(7) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code.

Article 4: Treatment of Claims and Interests Under the Plan

- 4.01 Claims and interests shall be treated as follows under this Plan:

Class	Impairment	Treatment
Class 1 - Priority claims excluding those in Article 3	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan, or the date on which such claim is allowed by a final non-appealable order. Except: _____."] [Add classes of priority claims if applicable]
Class 2 – Secured claim of [Insert name of secured creditor.]	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add classes of secured claims if applicable]
Class 3 – Non-priority unsecured creditors	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - Equity security holders of the Debtor	<input type="checkbox"/> Impaired <input type="checkbox"/> Unimpaired	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

Article 5: Allowance and Disallowance of Claims

- 5.01 **Disputed claim** A *disputed claim* is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either:
- (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or
 - (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.
- 5.02 **Delay of distribution on a disputed claim** No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].
- 5.03 **Settlement of disputed claims** The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Article 6: Provisions for Executory Contracts and Unexpired Leases

- 6.01 **Assumed executory contracts and unexpired leases** (a) The Debtor assumes, and if applicable assigns, the following executory contracts and unexpired leases as of the effective date:
- [List assumed, or if applicable assigned, executory contracts and unexpired leases.]

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- (b) Except for executory contracts and unexpired leases that have been assumed, and if applicable assigned, before the effective date or under section 6.01(a) of this Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date.

A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than days after the date of the order confirming this Plan.

Article 7: Means for Implementation of the Plan

[Insert here provisions regarding how the plan will be implemented as required under § 1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, including any claims reserve to be established in connection with the plan, as well as who will be serving as directors, officers or voting trustees of the reorganized Debtor.]

Article 8: General Provisions

- | | |
|--|---|
| 8.01 Definitions and rules of construction | The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions:

[Insert additional definitions if necessary]. |
| 8.02 Effective date | The effective date of this Plan is the first business day following the date that is 14 days after the entry of the confirmation order. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay expires or is otherwise terminated. |
| 8.03 Severability | If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan. |
| 8.04 Binding effect | The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity. |
| 8.05 Captions | The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan. |
| [8.06 Controlling effect | Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of <input type="text"/> govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.] |
| [8.07 Corporate governance | [If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.] |
| [8.08 Retention of Jurisdiction | Language addressing the extent and the scope of the bankruptcy court's jurisdiction |

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after the effective date of the plan.]

Article 9: Discharge

[Include the appropriate provision in the Plan]

[No Discharge -- Section 1141(d)(3) IS applicable.]

In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

[Discharge -- Section 1141(d)(3) IS NOT applicable; use one of the alternatives below]

[The following 3 alternatives apply to cases in which a discharge is applicable and the Debtor DID NOT elect to proceed under Subchapter V of Chapter 11.]

[Discharge if the Debtor is an individual and did not proceed under Subchapter V]

Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a partnership and did not proceed under Subchapter V]

On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

[Discharge if the Debtor is a corporation and did not proceed under Subchapter V]

On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

- (i) imposed by this Plan; or
- (ii) to the extent provided in § 1141(d)(6).

[The following 3 alternatives apply to cases in which the Debtor DID elect to proceed under Subchapter V of Chapter 11.]

[Discharge if the Debtor is an individual under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt:

- (i) imposed by this Plan; or
- (ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

If the Debtor's Plan is confirmed under § 1191(b), confirmation of the Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

- (i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192;

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or
(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a partnership under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

If the Debtor's Plan is confirmed under § 1191(b), confirmation of the Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

- (i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192;
- or
- (ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a corporation under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

- (i) imposed by this Plan; or
- (ii) to the extent provided in § 1141(d)(6).

If the Debtor's Plan is confirmed under § 1191(b), confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

- (i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192;
- or
- (ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

Article 10: Other Provisions

[Insert other provisions, as applicable.]

Respectfully submitted,

X

[Signature of the Plan Proponent]

[Printed Name]

X

[Signature of the Attorney for the Plan Proponent]

[Printed Name]

Committee Note

This form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Because there will generally not be a disclosure statement in subchapter V cases, § 1190 of the Code provides that plans in those cases must include a brief history of the debtor's business operations, a liquidation analysis, and projections of the debtor's ability to make payments under the plan. Those provisions are added to a new Background section of the form with an indication that they are to be included in plans only in subchapter V cases.

Article 9 of the form is amended to include descriptions of the effect of a discharge in a case under subchapter V. The plan proponent is directed to include in the plan the particular provision that is appropriate for the case.

Legislative Update

Not Fake News: Congress Enacts New, Sensible Bankruptcy Reform

Editor's Note: President Donald Trump signed into law several bankruptcy law changes on Aug. 23, 2019: the Family Farmer Relief Act (Pub. L. 116-51), the Honoring American Veterans in Extreme Need (HAVEN) Act (Pub. L. 116-52) and the Small Business Reorganization Act (Pub. L. 116-54). Each law is bipartisan and bicameral, a rare event on Capitol Hill in 2019. Collectively, the legislative package represents the most significant amendment to bankruptcy law since 2005.

ABI was very involved in the development of the package and held a live webinar on Aug. 28 to discuss the laws. The following are excerpts from the webinar, moderated by ABI Executive Director **Sam Gerdano**. The full webinar is available for download at abi.org/newsroom/press-releases/educational-press-briefings.

In addition, this issue features three articles, written by ABI members, that discuss various aspects of the reform: *On Our Watch* (p. 12), *Consumer Corner* (p. 14) and *News at 11* (p. 16). These articles round out a special section on the latest bankruptcy reforms enacted into law.

Gerdano: We're lucky to have with us several ABI members who followed these legislative developments and can help us understand both a reasoning behind their creation as well as the impact for practitioners. **Bob Keach** with Bernstein Shur in Portland, Maine, will discuss the small business legislation. Bob testified for ABI in support of the bill before the House Judiciary Committee recently, and he also served as the co-chair of ABI's Chapter 11 Reform Commission. **Kristina Stanger** of Nyemaster Goode in Des Moines, Iowa, is a member of ABI's Veterans Affairs Task Force and will talk to us about the HAVEN Act. **Joe Peiffer** of Ag and Business Legal Strategies from Cedar Rapids, Iowa, and **Don Swanson** from Koley Jessen in Omaha, Neb., will talk to us about the Family Farmer Relief Act. They each have more than 30 years of experience in bankruptcy and agricultural law issues, and we look forward to their discussion with us about the chapter 12 amendments. So thanks to all of our guests for not only joining us today, but for your support during the legislative process.

Let me start first with the Small Business Reorganization Act.... This has been identified by at least by one commentator as a kind of a "new frontier" for small business cases. What does the law do and why is it important?

Keach: First, it's probably a good idea to just touch briefly on why we needed the bill and then what it does to solve those problems the ABI Commission found through its multiple years of field hearings and testimony. We found that small businesses were not only not succeeding in chapter 11,

but they were actually avoiding filing chapter 11 altogether. Given the relatively simple capital structure of most small businesses, filing a chapter 11 almost certainly resulted in a loss of ownership by the very shareholders or interest-holders who had often founded the company and who were management of the company.



Robert J. Keach



Kristina M. Stanger



Joseph A. Peiffer



Donald L. Swanson

That's because the absolute-priority rule provided that if they did not pay all of their debt in full, they could only maintain their ownership interest with the consent of all their creditors by making a considerable contribution of new value, meaning fresh new money from outside of the business. Obviously, that kind of infusion was seldom available, and often it was not possible to get full creditor consent.

The Small Business Reorganization Act fixes this problem through the debtor's voluntary election to be treated as a subchapter V debtor, effective on Feb. 19, 2020. The debtor has to choose to file under this provision. The SBRA permits the debtor to confirm a plan over creditor objection by dedicating three to five years of net operating income as payment to creditors ... notwithstanding the absolute-priority rule. In other words, the absolute-priority rule will not apply.

The bill also provides for relative simplicity and efficiency. There's an early status conference held by the court to determine the course of the case within the first 60 days, and the plan is going to be filed within 90 days, subject to an extension if the debtor through reasons not within its control needs more time. There is presumptively no creditors' committee and therefore no committee counsel, committee professionals and the accompanying administrative expense.

Instead, there is a provision for a trustee, or the U.S. Trustee can appoint a standing trustee. It's important to emphasize this is not an operating trustee. This is a debtor-in-possession bill, and the trustee is there largely to supervise the restructuring, to review the debtor's financial information, to make recommendations to the court as

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appropriate, and in general to assist the debtors in complying with the plan requirements so that creditors get paid. Counsel who have been in chapter 12 cases or chapter 13 cases will recognize this role.

There is also presumptively no disclosure statement that goes with the plan. The court will be asked to determine that the plan is feasible and doesn't discriminate unfairly. Also note that with respect to the current controversy regarding quarterly U.S. Trustee fees, these aren't applicable in subchapter V proceedings.

We hope [that] the benefits are efficiency and low costs. We hope that the means to confirm a plan over creditor objection if it's both feasible and meets the other conditions of the law will be a draw to debtors who were staying away from chapter 11. We think [that] it'll save a lot of small businesses that would not have been saved because either they would have forgone the opportunity altogether, or they would have simply failed under the current regime.

Gerdano: We've run some numbers in terms of the percentage of current cases where this would be potentially applicable, and we found that about 40 percent of the chapter 11 cases filed between 2014 and 2018 could have been eligible for reorganization as a small business under subchapter V. And in nearly three-quarters of the judicial districts, at least half of the business chapter 11 cases would be eligible for subchapter V treatment, which is significant.

Keach: I would think it's very significant. And, in fact ... if you look at Commission numbers, which are a slightly older data set than some of the numbers you just provided, that percentage number is ... about 58 percent. So we think this is going to have a material impact.

When it becomes effective, I think debtors' practitioners will love the bill, but frankly ... creditors and particularly secured creditors will come to love this bill as well because ... they will find that it doesn't really impact their interests any more significantly than was previously the case. I also think they're going to find that these are going to be much more efficient and less costly.

I think a lot of us would have liked to have seen the debt limit here a little bit higher, similar to what happened with the level in the chapter 12 bill, but ... as parties use this statute, it wouldn't shock me if it were amended to encompass more.

Gerdano: There's also a provision in the Small Business Reorganization Act which applies to preference actions — providing some potential relief from questionable bankruptcy preference claims. Can you explain those provisions as well?

Keach: Again, the Commission's work revealed a considerable dissatisfaction with the way the preference provisions were operating. The SBRA, consistent with the Commission's findings, does two things. It creates a due-diligence requirement for the party bringing preference actions. So the trustee or debtor in possession or post-confirmation trust to whoever it is has been assigned these causes of action can bring preference action[s] only based on reasonable due diligence, taking into account known or reasonably known

affirmative defenses. That's largely going to mean that discernible defenses like ordinary course and new value have to be looked at by the party bringing the case before they bring the action. This is going to end the practice that some have referred to as "preference factories." Secondly, in order to sue the preference defendant outside of their home district, the preference has to involve an amount at issue of \$25,000 or more, up from current law of about \$13,600. This is a universal reform; it applies to all chapters of the [Bankruptcy] Code where preferences can be brought.

Gerdano: How will the small business trustee be compensated?

Keach: The trustee has to be compensated from assets of the estate. I think in the case of conversion, those trustees will be compensated the way they've always been compensated: either out of a set amount paid out of filing fees, or as a consequence of the assets of the estate. As we know in conversion, trustees have the burial expenses priority and have a first administrative claim on any free assets.

I know that the U.S. Trustee's office is hard at work already and really started work examining how they're going to staff the trustee position. I know they'll soon actively look for what could be hundreds of capable people to do this.

I personally have a preference for this position being filled by financial advisory types as opposed to lawyers ... to assist debtors in the preparation of their plans and their business plans. So it may have some elements of the estate fiduciary concept that the Commission identified. I think the position will evolve....

Gerdano: I want to move to talk about the chapter 12 provisions. This has the virtue of being the simplest bill, simply with respect to raising the debt limit. [Joe and Don will] comment on what they think the impact will be, since both of you are in heavy [agriculture] states, indeed really every state with agriculture.

Peiffer: I think the impact will be to open the floodgates, and ... will be very good in the long run. Increasing the debt limit to \$10 million will allow many of the farmers that previously did not qualify to qualify for chapter 12. It allows the family farmer to have the opportunity to maintain assets and also minimize taxes because of the special tax provisions in chapter 12 that are not available in any other chapter of the Bankruptcy Code.

Gerdano: Since chapter 12 was added to the Bankruptcy Code in 1986, more than 30,000 cases have been filed. In the most recent 12-month period ending June 30, 2019, there were 535 chapter 12 cases filed, which was up 13 percent from the prior year. These are spread around the country, [with] Wisconsin being the top filing state, but other states in the midwest like Kansas and Minnesota had high numbers of filings, as did Georgia, with 29 cases. But even California, New York and other states in different parts of the country showed an increase in filings. Interestingly, the House sponsor of the chapter 12 bill is Congressman [Antonio] Delgado

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from upstate New York, where dairy farms in particular are under duress. Don ... I know you've been involved in a lot of these cases in Nebraska; more cases have been filed there than any other state since 1986. What do you see as the impact of the higher debt limit?

Swanson: The impact will allow the purpose of chapter 12 to stay relevant for career farmers. Until last week, a farmer with \$5 million of debt was stuck in chapter 11. In the 1980s, a \$1.5 million of debt worked. But farming during that time ... changed dramatically. It had gone from two-wheel drive tractors to monster machines pulling wide, wide swaths of equipment with GPS precision. So today's \$10 million limit is basically today's equivalent of \$1.5 million back in 1986. So it makes the purpose of chapter 12 continue to be relevant....

It's effective immediately, so it changes your counseling to small business. If you're dealing with a situation where bankruptcy perhaps wasn't an option, now it could impact the bargaining and negotiating lenders. The reason [that] chapter 12 came into existence is because the absolute-priority rule gave creditors a veto over the case. You could have cash flows that worked and projections that were great, but you could never get a plan confirmed because a dominant creditor said "no." It's still the situation for those who do not qualify for chapter 12, where the first thing you do as an attorney sitting down with a farmer not eligible for chapter 12 is saying, how are we going to deal with the absolute-priority rule?

Now the question is, what will cash flow here? We have to pay basically the value of what we're keeping. That is a world of difference.

Gerdano: During the legislative process, the American Bankers Association submitted testimony to the House Judiciary Committee suggesting that it would reduce access to credit or increase the cost of credit. What do you make of those assertions?

Peiffer: There is an assumption that the alternative to reorganization in chapter 12 is paying creditors, but that's not the reality at all. What the 1980s farm crisis teaches us is that the reality of the alternative to reorganization in chapter 12 is a forced liquidation after a failed chapter 11.

Gerdano: I want to get to the HAVEN Act now and ask Kristina about this fix to a problem for disabled veterans under the Code.

Stanger: The HAVEN Act came from a drive based on epidemic rates of suicide among our military, arising in part because of financial distress. There are about 19 million veterans in the United States, and 25 percent of them were receiving disability. But we found that disabled veterans were treated differently in the Bankruptcy Code.

Benefits paid by the Department of Veterans Affairs and Department of Defense were included in the calculation of the debtor's disposable income under the 2005 means test, making many ineligible for bankruptcy relief. This was not because of a policy change, but rather a legislative oversight. The HAVEN Act now excludes disability and death-related benefits to veterans and their survivors, the same way it

applies to Social Security benefits. It's effective immediately, so we're starting to see the impact on veterans and veterans' families even as early as tomorrow.

Gerdano: What was the role of the ABI Veterans Task Force in raising awareness on this issue?

Stanger: That was the beauty of bringing a number of diverse folks together. Essentially, a band of bankruptcy brothers and sisters came together through ABI [that] included attorneys, professors, judges and those with patriotism in their heart.... We were fortunate to team up with Mrs. Holly Petraeus, who ... was a leader in the Consumer Financial Protection Bureau in the Office of Service Member Affairs. In a military operation, we'd call this a tiger team of devoted individuals who, through a grassroots campaign, made calls or emails or office visits to talk about updating this law and bringing parity to disabled veterans.

Gerdano: We do have a couple of questions from our audience. One is on the dollar amount limit for eligibility under the small business law. The new law adopts the existing small business definition, so that is currently \$2,725,625. This number does get adjusted for inflation every three years. As Bob noted, the Commission recommended a higher number of \$10 million and the National Bankruptcy Conference recommended \$7.5 million. And I think the idea here is that Congress would be interested in seeing what the experience is over the next year or so to see if that number should be adjusted. Also ... we had a question about the U.S. Trustee quarterly fee exception....

Keach: That's ... extraordinarily impactful, as a benefit for the subchapter V debtors. The new law amends 28 U.S.C. § 1930(a)(6) to exclude these cases from the statutory obligation to pay quarterly fees.

Gerdano: We have an audience question on the HAVEN Act's application to pending cases in chapter 13 cases that might have been eligible for conversion or modification. Kristina, any thoughts on retroactive application to those cases that are pending in chapter 13?

Stanger: This is a great question because ... we're already working through and using the new law to help out veterans in a particular case that we know is pending tomorrow. I would say take a look at § 1325(b)(1)(B), which addresses confirmation of plans. It relies on that definition of disposable monthly income, which ... now incorporates the change in current monthly income with respect to disabled veterans' benefits.... I would submit to you that you can incorporate and exclude those veterans' benefits now ... so I definitely encourage our practitioners to take a look at even plans that are confirmed and consider modification where appropriate. And if not, you can perhaps dismiss and refile.

Gerdano: What about a chapter 11 farm case that's pending in that chapter because of the former lower debt limit? Can you now convert it to the new chapter 12, or do you dismiss and refile?

Peiffer: Since eligibility for chapter 12 is determined as of the date of filing, I think you'll have a problem with doing a conversion. So you're probably going to be stuck having to

dismiss and refile. However, if you file a motion to convert and it's granted, I think you're home free.

Gerdano: We have another question about payment of the standing trustee under the SBRA.... Bob, you may have mentioned this earlier that we believe that the practice will be similar to the way standing trustees are paid in chapter 12 case.

Keach: I think that's right. If it's a standing trustee, it will be similar to where they're paid in chapter 12 cases. If it's not a standing trustee, I think they'll be paid the way appointed trustees are paid, which is out of the available assets of the estate.... [T]hat's why it's important to remember that the trustee here is not an operating trustee. This should be a relatively light touch similar to what is done by chapter 13 and chapter 12 trustees. In cases that are well run from all sides, their role can be modest, although significant.

Gerdano: In terms of the effective date, we mentioned earlier that this was a 180-day lead time, which would mean that the SBRA will become effective on Feb. 19, 2020, for cases filed on or after that date, and that the U.S. Trustee will appoint a trustee for each subchapter V case.

Keach: Correct, and unless and until it decides to use a standing trustee format in any particular district, that'll obviously be within the discretion of the U.S. Trustee's office. I'm sure they'll be a period of monitoring the cases and seeing how they work to see whether it evolves to a standing trustee, and that will obviously depend on parties being willing to fill those roles and performing them capably. The timing of that is also subject to the U.S. Trustee's office's discretion.

Gerdano: What happens to income earned during the subchapter V proceeding?

Keach: There's a definition of "property of the estate" that includes post-petition income of the estate ... the statute provides that the plan provides for all the projected disposable income of the debtor received in the three-year period — in other words, three-year period post-petition or such a longer period not to exceed five years as the court may fix. You may have a situation where, just due to particular debtor circumstances, the three-year period doesn't produce meaningful payout or ... otherwise comply with the feasibility requirements. The court may decide, perhaps at the urging of a creditor, to extend the period. This is typical to what is now allowed under chapter 13, for example, or individual chapter 11, where the time period can be expanded by the court.

Gerdano: So much of this new law is based on a chassis of procedure that is well-known to the Bankruptcy Code. Perhaps not in chapter 11 so much, but certainly chapter 12 and chapter 13, in terms of treating disposable income concepts which will be new for the chapter 11 bar. But again, we're talking about a different type of case here. These are \$2.7 million cases.

Keach: Again, one of the things [that] the Commission recommended in its own version of this is that the initial status conference to be held in the first 60 days of the case is intended to be significant and substantive in charting the course of the case, including when the plan will be filed [and] what the plan will look like. It's intended to be more than just a check-in. It's really intended to be a session that

determines the course of the chapter 11 case and provides for its efficient exit.

Gerdano: In terms of eligibility, will this apply to single-asset real estate cases?

Keach: No, single-asset real estate cases are excluded. And in addition to the dollar amount requirement, there is a requirement that 50 percent of the revenue arise from commercial and business activity as well.... So we really are talking about Main Street businesses.

Gerdano: And for them, chapter 11 is the bell that doesn't ring because it's just simply too expensive and the loss-of-control issues are just too significant. This is where the SBRA could really be a new frontier for small business cases.

Keach: Absolutely; under the current provisions, whether it's ... small business or even regular chapter 11 for slightly larger small businesses, if you inform your clients that filing means they'll likely lose control of their business and they will be liquidated, and that they may be the only party not eligible to attempt to purchase it, that's not a great advertisement for filing. That advice will change, and I think the early reaction from the bar and from practitioners is that the SBRA will really help. Obviously the future will tell, but we're optimistic about that.

Gerdano: One more practical question ... that just came in points to § 1195, which provides that estate professionals can have a pre-petition claim of less than \$10,000 and still be considered disinterested for purposes of Code § 327.

Keach: It provides that a person is not disqualified for employment under § 327, which is where the disinterestedness test is embodied, solely because that person holds a claim of less than \$10,000 that arose prior to commencement of the case. Current practice would require that a pre-bankruptcy counsel for the debtor who was unpaid at the time of filing would have to waive that claim in order to be disinterested. And this provision provides that the claim does not need to be waived and that may result in counsel having more incentive again to file the case ... again, it goes to the relative efficiency and cost by not having to change counsel and being able to use your pre-petition counsel.

Gerdano: One final question on the preference provision ... again note that these apply across the board in chapter 11 cases, not just in subchapter V cases. With respect to the requirement that statutory defenses be considered before filing a demand letter, how effective will this be to weed out some unworthy complaints?

Keach: What the statute says is reasonable diligence in the circumstances of the case, taking into account the parties known or reasonably knowable affirmative defenses. Obviously, you know many times the trustee is at the mercy of the state of the debtor's records. And, as we all know, many businesses, even large businesses, often don't have great business records.

I'm sure that'll be taken into account. But remember, particularly in larger cases, trustees have Rule 2004 at their disposal and have the ability to do due diligence. I think the onus here is going to be on starting the process early — not starting it just before the filing deadlines. The statute doesn't

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prescribe sanctions, but the section (a) that we're talking about here that contains the diligence provision will be an amendment to § 547(b)'s preamble, [which] stated, as a precondition to filing the case as opposed to sanctions available to a court, everything including dismissing the case as being improvidently brought. So I think that trustees and debtors and liquidating trustees and others are going to have to take this very seriously. And, if for any reason they were unable to do the due diligence, they may want to seek guidance from the court before the time runs out.

Gerdano: I want to thank you all for joining us for this webinar on the new bankruptcy laws and especially thank our guests for taking the time to help us understand the laws and their impacts. Follow the ABI website [abi.org] for more details and programming activities about the new laws. They will be in focus at the Winter Leadership Conference coming up in December in California. **abi**

Editor's Note: *For more information on ABI's Winter Leadership Conference, visit abiwlc.org.*

News at 11

BY BRIAN GIFFORD AND LAURA ATTACK¹

Chapter 11's Double Whammy on Individual Debtors

We have come a long way since the U.S. Supreme Court decided that individuals not engaged in business are eligible to file under chapter 11.² Today, it is commonplace for individuals who exceed chapter 13's debt limits to consider chapter 11 as a path forward when they need to restructure their debts. In fact, a national study funded by ABI noted that the share of chapter 11 cases filed by individuals has increased over time and that individuals now file more than 25 percent of chapter 11 cases.³

Individuals filing under chapter 11 face unique challenges due to the combined effect of two Bankruptcy Code provisions: Section 1129(a)(15)(B)'s "projected disposable income" standard, and § 1129(b)(2)'s "absolute priority" rule. In the words of the Sixth Circuit, these requirements can hit individuals with a "double whammy."⁴ This article examines the relief that the Small Business Reorganization Act of 2019 (SBRA) could potentially have to small business bankruptcies to avoid the impact of these Code sections.⁵

under the plan, but that debtors might distribute less than their entire projected disposable income if they use other property to make up for any shortfall.⁷ The "value of the property to be distributed under the plan" includes all distributions (including those made to priority creditors and administrative claimants), not just distributions to general unsecured creditors.⁸

Creditors whose claims are not being paid in full under a proposed plan have sometimes argued that § 1129(a)(15)(B), which references § 1325(b)(2), prohibits an individual debtor's post-confirmation personal expenses from being any higher than the expenses that an above-median-income chapter 13 debtor would be permitted to incur. At least one court has agreed and held that the expense limitations of chapter 13 apply to chapter 11 debtors who have above-median income.⁹ However, most courts, including a bankruptcy court that decided the issue earlier this year, have held that these limitations do not apply when the amounts reasonably necessary to be expended by debtors are being determined under § 1129(a)(15)(B).¹⁰



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The Projected-Disposable-Income Requirement

Section 1129(a)(15)(B)'s disposable-income requirement is triggered when the holder of an allowed unsecured claim that will not be paid in full objects to confirmation of the individual debtor's chapter 11 plan. Under these circumstances, the plan must provide that "the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2))" during the longer of five years or the period for which the plan provides payments.⁶

Courts have held that the amount of projected disposable income serves as the benchmark for determining the value of property to be distributed

The Absolute-Priority Rule

To confirm a proposed chapter 11 plan, a plan proponent must meet the standards set forth in § 1129(a), including the requirement that each impaired class has accepted the plan.¹¹ However, even when an impaired class of creditors votes to reject the plan, the Bankruptcy Code offers plan proponents another path to confirmation: a process commonly known as a "cramdown." In a cramdown scenario, all classes need not accept the plan so long as there is at least one accepting impaired class¹² and the plan "does not discriminate unfairly, and is fair and equitable" with respect to the dissenting creditors.¹³

¹ The views expressed in this article are solely those of the authors and do not necessarily reflect the views of any judge of the U.S. Bankruptcy Court for the Southern District of Ohio.

² *Toibb v. Radloff*, 501 U.S. 157 (1991).

³ Profs. Richard M. Hynes, Anne Lawton and Margaret Howard, "National Study of Individual Chapter 11 Bankruptcies," 25 *ABI Law Review* 61, 61 (Winter 2017), available at abi.org/member-resources/law-review. The study was commissioned by the ABI Endowment Fund.

⁴ *Ice House Am. LLC v. Cardin*, 751 F.3d 734, 740 (6th Cir. 2014).

⁵ ABI held a media webinar, which addressed the SBRA, among other legislative actions signed into law by President Donald Trump in August 2019. ABI Executive Director Samuel J. Gerdano moderated the webinar, which featured Robert J. Keach (Bernstein Shur; Portland, Maine) discussing the SBRA. An archive of the recording is available at abi.org/newsroom/press-releases/educational-press-briefings.

⁶ 11 U.S.C. § 1129(a)(15)(B).

⁷ See *In re Johnson*, No. 14-57104, 2016 WL 8853601, at *15 (Bankr. S.D. Ohio Nov. 10, 2016); *In re Pfeiffer*, No. 12-13852 (ALG), 2013 WL 5687512, at *1 (Bankr. S.D.N.Y. Oct. 18, 2013); see also Sally Neely, "How BAPCPA Changes Chapter 11 Cases for Individuals," SS029 ALI-ABA 625, 674 (West 2011).

⁸ See *Pfeiffer*, 2013 WL 5687512, at *3.

⁹ See *In re Angeron*, No. 18-10482, 2018 WL 6601130, at *3 (Bankr. E.D. La. Dec. 13, 2018); *In re Bennett*, No. 07-10864-SSM, 2008 WL 1869308, at *2 n.6 (Bankr. E.D. Va. April 23, 2008).

¹⁰ See *In re Hamilton-Gaertner*, No. 17-00271-5-DMW, 2019 WL 2366421, at *9 (Bankr. E.D.N.C. May 1, 2019); *Johnson*, 2016 WL 8853601, at *16-17; *In re Woodward*, No. BK11-40936, 2014 WL 1682847, at *4-5 (Bankr. D. Neb. April 29, 2014); *In re Bacardi*, No. 09 B 25757, 2010 WL 54760, at *5 n.2 (Bankr. N.D. Ill. Jan. 6, 2010); *In re Gray*, No. 06-927, 2009 WL 2475017, at *3 (Bankr. N.D. W. Va. Aug. 11, 2009); *In re Roedemeier*, 374 B.R. 264, 272-73 (Bankr. D. Kan. 2007).

¹¹ 11 U.S.C. § 1129(a)(8).

¹² 11 U.S.C. § 1129(a)(10).

¹³ 11 U.S.C. § 1129(b)(1).

Section 1129(b)(2) specifies certain requirements that a plan must meet in order to be found “fair and equitable.” Among those is the absolute-priority rule, which dictates that either dissenting creditors be paid in full or else no person with a junior claim or interest in property may “receive or retain under the plan on account of such junior claim or interest any property.”¹⁴ In plain terms, when strictly applied, the absolute-priority rule prevents individual debtors from keeping their property¹⁵ unless unsecured creditors are paid in full. Before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), that is exactly how the absolute-priority rule operated with respect to individual debtors.¹⁶

However, BAPCPA added an exception to the absolute-priority rule for individual debtors under which they are permitted to “retain property included in the estate under section 1115.”¹⁷ Following this change, the courts split on whether the absolute-priority rule retains any vitality in individual chapter 11 cases. Early on, a number of courts adopted the “broad view” that Congress effectively abrogated the absolute-priority rule in chapter 11 for individual debtors. Over time, more courts have adhered to the “narrow view,” concluding that Congress did not intend such a sweeping change and that the only property an individual chapter 11 debtor may now retain is property and earnings acquired post-petition. Today, the overwhelming majority of courts, including all circuit courts that have considered the issue,¹⁸ have adopted the narrow view and have held that BAPCPA did not abrogate the absolute-priority rule in its entirety for individual chapter 11 debtors.¹⁹

SBRA

The SBRA adds a new subchapter V to chapter 11 for small business debtors.²⁰ Importantly, it eliminates the double whammy for at least some individual chapter 11 debtors — those who are engaged in business.

Under the Bankruptcy Code, the term “person” includes an individual,²¹ and a qualifying “person” is eligible to be a small business debtor.²² Thus, although the availability of small business treatment for individuals might not be as widely appreciated as it perhaps should be,²³ the Bankruptcy Code has allowed qualifying individuals to be small business debtors ever since the small business provisions were added in 1994. The SBRA retains this feature of the Bankruptcy Code.

Like other debtors, an individual must meet several requirements in order to qualify as a small business debtor under the SBRA. First, the individual must be engaged in

commercial or business activities. Second, the primary commercial or business activity cannot be the ownership of single-asset real estate. Third, the debt involved must not exceed a cap (currently set at \$2,725,625) on aggregate noncontingent liquidated secured and unsecured pre-petition debts. Finally, at least 50 percent of those debts must have arisen from the debtor’s commercial or business activities.²⁴

An individual who satisfies this definition and wishes to be a small business debtor must make an election in order to proceed under subchapter V.²⁵ Upon making the election, several provisions of the Bankruptcy Code no longer apply, including § 1129(b),²⁶ which subchapter V replaces with new § 1191. Like § 1129(b), § 1191 permits confirmation of a plan so long as the plan does not discriminate unfairly and is fair and equitable with respect to any dissenting impaired classes. As long as those requirements are met, § 1191 will facilitate the reorganization of small business debtors by permitting a plan to be confirmed, even if there are no accepting impaired classes. In other words, gone are the days of small business debtors desperately seeking to obtain at least one accepting impaired class.²⁷

Even more importantly, § 1191 contains no absolute-priority rule. This change harkens back to the days when Congress declined to adopt the absolute-priority rule in chapter XI of the Bankruptcy Act, which was a remedy designed for small, privately held businesses. According to the legislative history of the 1952 amendments to the Act, “the fair and equitable rule ... cannot realistically be applied,” because if it were, “no individual debtor and ... no corporate debtor where the stock ownership is substantially identical with management could effectuate an arrangement except by payment of the claims of all creditors in full.”²⁸

In addition to eliminating the absolute-priority rule, the SBRA imposes a modified projected-disposable-income requirement. An individual chapter 11 debtor’s plan might satisfy this requirement in one of two ways. Under the first option, the plan might provide that “all of the projected disposable income of the debtor to be received [during a period of three to five years] will be applied to make payments under the plan.”²⁹ Alternatively, the plan might provide that “the value of the property to be distributed under the plan ... is not less than the projected disposable income of the debtor.”³⁰

Together, these alternatives appear to function in the same way that § 1129(a)(15) currently operates: the disposable-income requirement might be met using income or other property of the debtor. However, the SBRA includes a definition of “disposable income” for small business debtors that, unlike § 1129(a)(15), does not reference § 1325(b)(2).³¹

14 11 U.S.C. § 1129(b)(2)(B)(ii).

15 Courts have been divided on whether an individual debtor can keep exempt property without violating the absolute priority rule. Compare, e.g., *In re Gosman*, 282 B.R. 45, 49 (Bankr. S.D. Fla. 2002) (holding that because statute prevents retention of “any” property, even exempt property is subject to rule), with *In re Henderson*, 321 B.R. 550, 559-60 (Bankr. M.D. Fla. 2005) (holding that debtor may retain exempt property under absolute-priority rule, since such interest cannot be junior to that of unsecured creditors), *aff’d*, 341 B.R. 783 (M.D. Fla. 2006).

16 See *Northwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988).

17 11 U.S.C. § 1129(b)(2)(B)(ii). Section 1115 provides, in relevant part, that property of the estate in an individual chapter 11 case “includes, in addition to the property specified in section 541 — (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case ... and (2) earnings from services performed by the debtor after the commencement of the case.” 11 U.S.C. § 1115(a).

18 See, e.g., *Zachary v. Cal. Bank & Tr.*, 811 F.3d 1191 (9th Cir. 2016); *Ice House Am. LLC v. Cardin*, 751 F.3d 734 (6th Cir. 2014); *In re Lively*, 717 F.3d 406 (5th Cir. 2013); *Dill Oil Co. v. Stephens (In re Stephens)*, 704 F.3d 1279 (10th Cir. 2013); *In re Maharaj*, 681 F.3d 558 (4th Cir. 2012).

19 See *Stephens*, 704 F.3d at 1284-85 (listing cases on either side of split).

20 H.R. 3311, 116th Cong. (2019), available at [congress.gov/bills/116/house-bills/3311/text](https://www.congress.gov/bills/116/house-bills/3311/text).

21 11 U.S.C. § 101(41).

22 11 U.S.C. § 101(51D).

23 Data “suggest[s] that many individual debtors fail to identify as small business debtors despite qualifying under those provisions.” Hynes, Lawton and Howard, *supra* n.3, at 93.

24 11 U.S.C. § 51(D).

25 11 U.S.C. § 103(i).

26 11 U.S.C. § 1181(a).

27 For a discussion of the issues relating to the requirement of an accepting impaired class, see ABI Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations 248-50 (2014), available at [commission.abi.org/full-report](https://www.abi.com/2014-report).

28 H.R. Rep. No. 82-2320 (1952), reprinted in 1952 U.S.C.A.N. 1960, 1981-82. The absolute-priority rule remained in place for proceedings under chapter X of the Act, which was designed for the reorganization of public companies. See *Maharaj*, 681 F.3d at 561 n.3 (citing Ralph A. Peeples, “Staying In: Chapter 11, Close Corporations and the Absolute Priority Rule,” 63 *Am. Bankr. L.J.* 65, 66 (1989)).

29 11 U.S.C. § 1191(c)(2)(A).

30 11 U.S.C. § 1191(c)(2)(B).

31 11 U.S.C. § 1191(d) (defining “disposable income” for purposes of subchapter V as “the income that is received by the debtor and that is not reasonably necessary to be expended (1) for — (A) the maintenance or support of the debtor or a dependent of the debtor; or (B) a domestic-support obligation that first becomes payable after the date of the filing of the petition; or (2) for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor”).

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This should eliminate any argument that the expense limitations imposed on above-median-income chapter 13 debtors apply in cases of individual chapter 11 debtors who elect to proceed as small business debtors. Since that argument was accepted by few courts anyway, the most far-reaching effect of § 1191 is that the absolute-priority rule no longer applies in individual chapter 11 cases of qualifying debtors who elect to proceed under the new subchapter V.

Conclusion

The projected-disposable-income requirement and absolute-priority rule can hit individual chapter 11 debtors with a one-two punch. The SBRA might provide some relief for certain debtors who qualify as small business debtors, but eligible individuals who decline to make the subchapter V election will continue to face the “double whammy” — that is, they will be able to obtain effective bankruptcy relief only if they can satisfy both the projected-disposable-income requirement and the absolute-priority rule. **abi**

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