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# 2022 Alexander L. Paskay Memorial Bankruptcy Seminar

*Business Session*

## **Florida: The Ultimate Subchapter V Experiment**

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# Florida: The Ultimate Subchapter V Experiment

A Conversation About What It Is, What It Isn't,  
& What It Could Be In Florida and Beyond

## The Conversation

01

SUBCHAPTER V  
STATISTICS IN  
FLORIDA  
(SOUTHERN,  
MIDDLE, AND  
NORTHERN)

02

INTERESTING  
ISSUES AND  
CASELAW

03

TIPS AND TRICKS  
FOR THE DEBTOR  
AND CREDITOR

## What It Is & What It Isn't: Case Admin



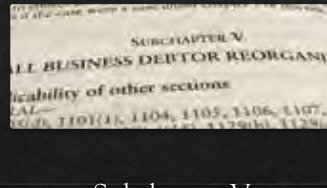
### Chapter 11

No business activity required

No Eligibility Debt Limit

Creditors Committee Possible

Disclosure Statement Required



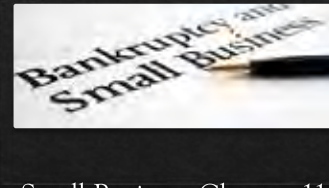
### Subchapter V

Must be engaged in business (not SARE)

\$7,500,000 Eligibility Debt Limit (\$2,725,625 after 3/26/2022)

No Creditors Committee

Disclosure Statement Not Required



### Small Business Chapter 11

Must be engaged in business

\$2,725,625 Eligibility Debt Limit (50% from business activities)

Creditors Committee Possible

Disclosure Statement Required

## What It Is & What It Isn't: The Plan

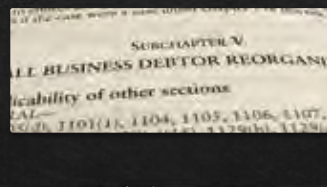


### Chapter 11

Exclusive Right to File Plan for 120 days

No Deadline from Plan Filing to Confirmation

At least 1 Impaired Class of Claims must Accept the Plan

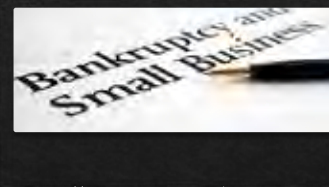


### Subchapter V

Exclusive Right to File Plan

No Deadline from Plan Filing to Confirmation

No Impaired Class Acceptance Requirement



### Small Business Chapter 11

Exclusive Right to File Plan for 180 days

45-day Deadline from Plan Filing to Confirmation

At least 1 Impaired Class of Claims must Accept the Plan

## What It Is & What It Isn't: Claims

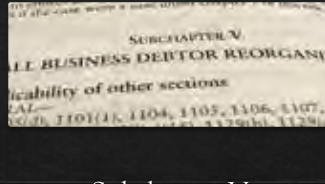


### Chapter 11

Automatic Stay applies

Cannot Modify Secured Claims  
against Homestead

Absolute Priority Rule applies

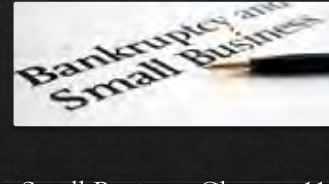


### Subchapter V

Automatic Stay applies

Can Modify some Secured Claims  
against Homestead -  
11 U.S.C. § 1190(3)

Absolute Priority Rule not  
applicable (even individuals)



### Small Business Chapter 11

Automatic Stay may not apply -  
11 U.S.C. § 362(n)

Cannot Modify Secured Claims  
against Homestead

Absolute Priority Rule applies

## What It Is & What It Isn't: Fees

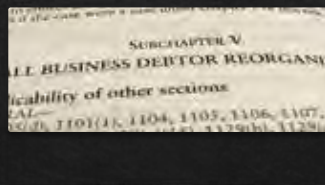


### Chapter 11

Pre-Petition Professional Fees =  
Waiver or Conflict

Quarterly Fees Due to  
United States Trustee

Administrative Claims  
Paid on Effective Date of Plan



### Subchapter V

Pre-Petition Professional Fees =  
Allowed up to \$10,000

Actual Fees Due to  
Subchapter V Trustee

Administrative Claims  
Paid over Life of Plan



### Small Business Chapter 11

Pre-Petition Professional Fees =  
Waiver or Conflict

Quarterly Fees Due to  
United States Trustee

Administrative Claims  
Paid on Effective Date of Plan



## What It Can Do

- ◆ Move much faster than a traditional Chapter 11 case and, consequently, lower cost
- ◆ Provide an immediate facilitator to help the Debtor resolve disputes with creditors and/or educate them about the bankruptcy process
- ◆ Allow a debtor (even individual) to avoid the absolute priority rule
- ◆ Provide options for confirmation (no voting requirement)

## What It Can't Do

- ◆ Lessen Disclosure: In fact, the opposite may be true. Immediate, complete disclosure is even more important in Subchapter V in order for the process to move along rapidly.
- ◆ Fix Stupid: Trustees are appointed due to their professional expertise and experience in resolving difficult Chapter 11 cases. They can't, however, magically undo pre-petition errors by the Debtor, force unreasonable creditors to see reason, or lessen the consequences of fraud.
- ◆ Alter feasibility: If you can't meet this test in other forms of Chapter 11, you will have the same challenge in Subchapter V.
- ◆ Linger Indefinitely: While some deadlines can be extended by the Court for circumstances outside the Debtor's control, there is a finite runway, and Debtors must be prepared to move the case forward.

## Your Best Guess on Statistics!

### Southern Case Statistics

- ◆ \_\_\_ Subchapter V Cases
  - ◆ \_\_\_ active/unresolved
  - ◆ \_\_\_\_ resolved - \_\_\_% “success” rate
    - ◆ \_\_\_ confirmed
    - ◆ \_\_\_ converted to Chapter 7 or 11
    - ◆ \_\_\_ structured dismissals
- ◆ Average SubV Trustee Fee = \_\_\_\_\_

## Middle Case Statistics

- ◆ \_\_\_ Subchapter V Cases
  - ◆ \_\_\_ active/unresolved
  - ◆ \_\_\_\_ resolved - \_\_\_% “success” rate
    - ◆ \_\_\_ confirmed
    - ◆ \_\_\_ converted to Chapter 7 or 11
    - ◆ \_\_\_ structured dismissals
- ◆ Average SubV Trustee Fee = \_\_\_\_\_

## Northern Case Statistics

- ◆ \_\_\_ Subchapter V Cases
  - ◆ \_\_\_ active/unresolved
  - ◆ \_\_\_\_ resolved - \_\_\_% “success” rate
    - ◆ \_\_\_ confirmed
    - ◆ \_\_\_ converted to Chapter 7 or 11
    - ◆ \_\_\_ structured dismissals
- ◆ Average SubV Trustee Fee = \_\_\_\_\_

## Sub V Statistics Nationally

- ◆ Through March 15, 2022 there have been 3,078 cases filed nationwide.
- ◆ Florida leads all states with 446 cases filed through March 15, 2022. The Middle District of Florida led all other Districts nationwide in the first year with over 140 cases filed. During the same time, the District of Rhode Island had ZERO subchapter V filings.
- ◆ Texas [331] and California [339] are the next two closest in terms of total cases filed.

## Case Decisions in the 11<sup>th</sup> Circuit: Eligibility

- ◆ *In re McGrath*, No. 3:20-bk-3689-RCT, 2021 Bankr. LEXIS 1491 (Bankr. M.D. Fla. June 2, 2021)
  - ◆ Where the only debt actually to be restructured in the plan was the mortgage on the single piece of commercial real property, the court held that the debtors' proposed plan was an attempt to "spin about" and use Subchapter V in a SARE case, which was an improper use of bankruptcy jurisdiction. Case dismissed for cause (with leave to convert to a Chapter 7 case).
- ◆ *In re ENKOGSI, LLC*, No. 6:21-bk-00276-KSJ, 2021 Bankr. LEXIS 1043 (Bankr. M.D. Fla. Apr. 20, 2021)
  - ◆ Hotels that provide room cleaning services, laundry services, internet/wi-fi services, phone services, bus and trailer parking, business services, complimentary breakfast, and/or a fully maintained swimming pool and fitness center are conducting substantial business other than operating real property, are not single asset real estate ("SARE") cases, and may proceed under Subchapter V.
- ◆ *In re Vertical Mac Construction, LLC*, No. 6:21-bk-01520-LVV, (Bankr. M.D. Fla. July 31, 2021)
  - ◆ The court held that a corporate debtor is eligible to sell the assets and liquidate in Subchapter V of chapter 11, even if the company had terminated normal operations before filing.



## Case Decisions in the 11<sup>th</sup> Circuit: Trustees

- ◆ *In re 218 Jackson, LLC*, No. 6:21-bk-00983-LVV, 2021 Bankr. LEXIS 2232 (Bankr. M.D. Fla. August 17, 2021)
  - ◆ A Subchapter V trustee's role was intentionally designed to be less adversarial – more like a mediator than an adversary.
  - ◆ Facilitation of a consensual plan is a principal duty of the trustee, making an independent and impartial trustee even more critical.
  - ◆ The Subchapter V trustee in that case was not disinterested as required by 11 U.S.C.S. § 1183(a) because he actively represented creditors pursuing the principal of the debtor's sole member in a separate case. Pursuant to 11 U.S.C.S. § 324, cause existed to remove the trustee because he held a material adverse interest against the equity security holder.
  - ◆ The trustee was also not entitled to compensation because, due to his conflict, his fees were not reasonable or necessary and not reasonably likely to benefit the debtor's estate as required by 11 U.S.C.S. § 330(a)(4)(A).

## Case Decisions in the 11<sup>th</sup> Circuit: Confirmation

- ◆ *In re Ellingsworth Residential Cmty. Ass'n*, No. 6:20-bk-01346-KSJ, 2020 Bankr. LEXIS 2897 (Bankr. M.D. Fla. Oct. 16, 2020)
  - ◆ A Subchapter V plan is “fair and equitable” and can be confirmed over creditor objection where it pays more than the debtor's disposable income to creditors, payments were likely, and the plan provides creditors a remedy for nonpayment. A formal disclosure statement is not required, and debtors needed only to provide a brief history of their operations, a liquidation analysis, projections with respect to payments under the plan, and submission of the future earnings or income to the trustee to ensure execution of the plan.

## Tips for Debtor's Counsel

- ◆ Make sure your client is eligible for Sub V.
- ◆ Press for more information than you may normally do in a standard Chapter 11 case. You will have less time to find solutions to hidden problems and stay on track in a Subchapter V.
- ◆ Start with all your cards on the table. Plan to be open with the Trustee and creditors if you want to obtain a consensual confirmation.
- ◆ Be willing to be creative. Prepare your client to be open to thinking outside the box,

## Tips for Creditor's Counsel

- ◆ Make sure the debtor is eligible for Sub V.
- ◆ Utilize the Subchapter V Trustee quickly. They are your best asset.
- ◆ Pick your battles with Debtor. You won't win them all, so aim to win the war.
- ◆ Utilize the intersection between consensual and non-consensual confirmation in order to maximize efficiency while protecting your client's position.
- ◆ Don't forget your leverage - you still have 1111(b) rights, 1112 rights, and the Debtor must prove feasibility.
- ◆ Push for a Disclosure Statement?

## Closing Thoughts

- ◆ CARES ACT

- ◆ Increased Debt Limit sunsets March 26, 2022

- ◆ MORATORIUMS

- ◆ Foreclosures and evictions resuming
  - ◆ No further moratoriums expected

# **A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019**

**Revised July 2021**

**Paul W. Bonapfel  
U.S. Bankruptcy Judge, N.D. Ga.**

Earlier versions of this paper were distributed in February 2020, May 2020, and July 2020. Supplements were added (effectively as “pocket parts”) as Chapter XIV (November 2020) and Chapter XV (April 2021).

This revision merges the material in the “pocket parts” into the body of the text and includes other editorial revisions that do not materially change the substance of the paper as supplemented in April 2021.

This revision also contains revised or new material dealing with the following subjects:

Eligibility requirements regarding “engaged in commercial or business activities” and debts arising from commercial or business activities – §§ III(C), (D), (E)

Eligibility of reporting company or affiliate of issuer – § III(G)

Removal of debtor in possession – § VI(C)

Temporary amendments to § 365(d) dealing with postpetition lease obligations – §§ VI(K), VII(C), VIII(D)(4).

Relationship of good faith requirement of § 1129(a)(3) and disposable income in consensual plan – § VIII(D)(8)

Property of the estate in subchapter V case of individual – § XI(B)(2)

The original version of the paper was published at 93 AMER. BANKR. L. J. 571 (2019).

The American Bankruptcy Institute has published an ebook version:

<https://store.abi.org/sbra-a-guide-to-subchapter-v-of-the-u-s-bankruptcy-code.html>

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APPENDIX D	Key Events in the Timeline of Subchapter V Cases (Prepared by Bankruptcy Judge Benjamin A. Kahn and Law Clerk Samantha M. Ruben)



# A Guide to the Small Business Reorganization Act of 2019

Paul W. Bonapfel  
U.S. Bankruptcy Judge, N.D. Ga.

## I. Introduction

The Small Business Reorganization Act of 2019 (the “SBRA”)<sup>1</sup> enacted a new subchapter V of chapter 11 of the Bankruptcy Code, codified as new 11 U.S.C. §§ 1181 – 1195, and made conforming amendments to several sections of the Bankruptcy Code and statutes dealing with appointment and compensation of trustees in title 28.<sup>2</sup> SBRA also revised the definitions of “small business case” and “small business debtor” in § 101(51C) and § 101(51D), respectively.<sup>3</sup> It took effect on February 19, 2020, 180 days after its enactment on August 23, 2019.

New subchapter V applies in cases in which a qualifying debtor elects its application. In the absence of an election, the pre-SBRA provisions of chapter 11 that govern a small business debtor apply with one change. SBRA amended § 1102(a)(3) to provide that no committee of

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<sup>1</sup> Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified in 11 U.S.C. §§ 1181-1195 and scattered sections of 11 U.S.C. and 28 U.S.C.).

<sup>2</sup> Unless otherwise noted, references to sections are to sections of the Bankruptcy Code, title 11 of the United States Code. Sections of the Bankruptcy Code added by the SBRA are referred to as “new § \_\_\_\_” in the text of this paper.

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

SBRA § 3(a) amends § 547(b) to require that a trustee seeking to avoid a preferential transfer must exercise “reasonable due diligence in the circumstances of the case” and must take into account a party’s “known or reasonably knowable” affirmative defenses under § 547(c). SBRA § 3(a).

SBRA § 3(b) amends 28 U.S.C. § 1409(b) to provide that a trustee may sue to recover a debt of less than \$ 25,000 only in the district where the defendant resides. Prior to the amendment, the amount (as adjusted under 11 U.S.C. § 104 as of April 1, 2019) was \$ 13,650.

<sup>3</sup> SBRA § 4(1)(A)-(B).

unsecured creditors is appointed in any case of a small business debtor unless the court orders otherwise.<sup>4</sup>

Under the SBRA, a debtor could not elect subchapter V if its debts (with some exceptions) exceeded \$ 2,725,625. The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”),<sup>5</sup> enacted and effective March 27, 2020, amended the SBRA to increase the debt limit to \$ 7.5 million for purposes of subchapter V for one year and made certain technical corrections. The Covid-19 Bankruptcy Relief Extension Act of 2021<sup>6</sup> amended the CARES Act to extend the increased debt limit for an additional year. The later legislation did not increase the debt limits in a small business case.

The Consolidated Appropriations Act, 2021 (the “CAA”) temporarily amended § 365(d) to permit the court to extend the time for a debtor in a sub V case in certain circumstances to comply with its postpetition obligations under a lease of nonresidential real property and to permit deferred payment of such obligations under a nonconsensual, “cramdown” plan.<sup>7</sup> Section VI(K) discusses this amendment.

Appendix A is a chart that lists sections of the Bankruptcy Code that SBRA affected and summarizes the changes, as affected by the CARES Act.

The purpose of SBRA is “to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs.”<sup>8</sup> A sponsor of the legislation stated that it

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<sup>4</sup> SBRA, § 4(a)(11), 133 Stat. 1079, 1086.

<sup>5</sup> Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

<sup>6</sup> Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

<sup>7</sup> Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat. 1182, 3219 (December 27, 2020).

<sup>8</sup> H.R. REP. NO. 116-171, at 1 (2019), available at <https://www.govinfo.gov/content/pkg/CRPT-116/hrpt171/pdf/CRPT-116hrpt171.pdf>.

For a summary of small business reorganizations under the Bankruptcy Code, see Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 BANKRUPTCY LAW LETTER, no. 10, Oct. 2019, at 1-4.

allows small business debtors “to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business,” which “not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.”<sup>9</sup> Courts have taken the legislative purpose of SBRA into account in their application of the new law.<sup>10</sup>

SBRA has had a significant impact. A preliminary estimate was that approximately 40 percent of chapter 11 debtors in chapter 11 cases filed after October 1, 2007, would have qualified as a subchapter V debtor and that about 25 percent of individuals in chapter 11 cases

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Amendments to the Bankruptcy Code in 1994 permitted a qualifying small business debtor to elect small business treatment. As amended, § 1121(e) provided that, in a small business case, only the debtor could file a plan for 100 days after the order for relief and that all plans had to be filed within 160 days. In addition, amended § 1125(f) permitted parties to solicit acceptances or rejections of a plan based on a conditionally approved disclosure statement and permitted a final hearing on the disclosure statement to be combined with the hearing on confirmation.

The Bankruptcy Abuse Protection and Consumer Protection Act of 2005 (“BAPCPA”) significantly changed the small business provisions. Importantly, it eliminated the debtor’s option to choose small business treatment. As such, a business that qualifies as a small business debtor became subject to all of the provisions governing small business cases.

BAPCPA replaced both § 1121(e) and § 1125(f).

BAPCPA’s § 1121(e)(1) extended the exclusive time for the debtor to file a plan to 180 days and imposed a new 300-day deadline for the filing of a plan. BAPCPA also added § 1129(c) to require confirmation of a plan in a small business case within 45 days of its filing, unless the court extended the time.

BAPCPA’s § 1125(f) added a provision that permitted the court to determine that the plan provided adequate information such that a separate disclosure statement was not required.

BAPCPA also added § 1116 to prescribe additional filing, reporting, disclosure, and operating duties applicable only to small business debtors.

Although some of BAPCPA’s small business provisions facilitated chapter 11 reorganization for a small business debtor, others appeared to reflect skepticism about the prospects for success of a small business debtor in a chapter 11 case and specific, more intensive supervision of the administration of their cases. In practice, reporting and confirmation requirements applicable to small business debtors remained burdensome or unworkable for many small businesses. *See, e.g., Amer. Bankr. Inst. Comm’n to Study the Reform of Chapter 11: 2012-14 Final Report & Recommendations*, 23 AMER. BANKR. INST. L. REV. 1, 324 (2015) (For many small or medium-sized businesses, “the common result of plan confirmation extinguishing pre-petition equity interests in their entirety [are] unsatisfactory or completely unworkable.”).

Because SBRA did not repeal SBRA’s provisions relating to a “small business debtor,” a small business debtor that does not elect subchapter V is in a small business case and subject to the provisions that BAPCPA added.<sup>9</sup> H.R. REP. NO. 116-171, at 4 (statement of Rep. Ben Cline). The court in *In re Progressive Solutions, Inc.*, 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020), reviewed the legislative progress of SBRA and included public statements from several cosponsors of the law, including Senators Charles Grassley, Sheldon Whitehouse, Amy Klobuchar, Joni Ernst, and Richard Blumenthal. *See also* Michael C. Blackmon, *Revising the Debt Limit for “Small Business Debtors”: The Legislative Half-Measure of the Small Business Reorganization Act*, 14 BROOK. J. CORP. FIN. & COM. L. 339, 344-45 (2020).

<sup>10</sup> *E.g., In re Ventura*, 615 B.R. 1, 6, 12-13 (Bankr. E.D.N.Y. 2020); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020).

would qualify.<sup>11</sup> The economic circumstances arising from the Covid-19 pandemic and the temporary increase of the debt limit under the CARES Act most likely increased the number of subchapter V cases.<sup>12</sup>

Subchapter V resembles chapter 12 in some aspects.<sup>13</sup> It provides for a trustee in the case while leaving the debtor in possession of assets and control of the business. The trustee has oversight and monitoring duties and the right to be heard on certain matters. In some cases, the trustee may make disbursements to creditors.

But subchapter V differs from chapter 12 in significant ways. For example, whereas chapter 12 confirmation standards (§ 1225) are similar to those in chapter 13 (§ 1325), subchapter V confirmation requirements incorporate most of the existing confirmation requirements in § 1129(a). Unlike chapter 12, subchapter V does not provide for a codebtor stay.

Enactment of SBRA required revisions to the Federal Rules of Bankruptcy Procedure and the Official Forms. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the “Rules Committee”) had authority to make changes in the Official Forms to take effect on SBRA’s effective date. Changes to the Bankruptcy Rules,

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<sup>11</sup> Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 5-6 (discussing Bob Lawless, *How Many New Small Business Chapter 11s?*, CREDIT SLIPS (Sept. 14, 2019), <http://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html>). Professor Brubaker points out that the percentage may ultimately be higher because pre-SBRA law provided incentives for a debtor to avoid qualification as a small business debtor and because debtors who might not have filed under pre-SBRA law because of its obstacles might now do so. The estimate does not take into account the increase in the debt limit that the CARES Act temporarily made.

<sup>12</sup> For a discussion of strategies for creditors in view of the enactment of subchapter V, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251 (2020).

<sup>13</sup> As the court observed in *In re Trepetin*, 617 B.R. 841, 848, n. 14 (Bankr. D. Md. 2020):

Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference.