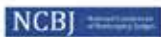


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Oct. 13, 2020, 3:30-4:45 p.m.

Association of Insolvency & Restructuring Advisors: SBRA – A Lot of Ground Has Been Covered Since February

Stephen B. Darr; Huron Consulting Group Inc.

Robert J. Keach; Bernstein, Shur, Sawyer & Nelson, P.A.

Stephen G. Morrell; Office of the U.S. Trustee

Hon. Jerrold N. Poslusny; U.S. Bankruptcy Court (D. N.J.)

Educational Materials

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Restructuring, Insolvency & Distressed Debt Virtual Summit

SEPTEMBER 16 - OCTOBER 27, 2020

INSOLVENCY 2020

RESTRUCTURING, INSOLVENCY & DISTRESSED DEBT VIRTUAL SUMMIT

SUBCHAPTER V PRESENTATION OCTOBER 13, 2020-3:30 pm

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Insolvency &
Restructuring Advisors

Introductions

Hon. Jerrold N. Polusny, Jr.
District of New Jersey

Stephen G. Morrell
Assistant US Trustee
Portland, ME

Robert Keach
Bernstein, Shur
Portland, ME

Stephen B. Darr
Huron Consulting Group
Boston, MA

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Purpose of Subchapter V

- Make Chapter 11 more accessible to distressed small businesses by:
 - Lowering costs for small business debtors to reorganize;
 - Providing a rapid roadmap for confirmation of a Plan of Reorganization;
 - Eliminating owners' risk of losing equity in business due to absolute priority rule; and
 - Avoiding litigation regarding new value
- Originally limited to debtors with non-insider, liquidated debt of less than \$2,725,625
 - CARES Act increased limit to \$7,500,000 for 1 year

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Current Popularity

- Approximately 800 cases filed since February 19, 2020
 - Effect of Federal, state and local COVID Assistance programs
 - Possible delay in case filing due to federal, state and local COVID assistance programs
- Increased volume of cases anticipated when:
 - COVID assistance loans are spent
 - Expiration of \$7,500,000 limit nears

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Benefits of Subchapter V

- Generally, no-
 - Creditor's Committees, unless the court orders otherwise
 - US Trustee fees
 - Disclosure Statement required
 - Plan must provide certain information, including
 - Brief history of the business operations of the debtor, a liquidation analysis, and projections with respect to the debtors' proposed payments under the proposed plan
 - Absolute Priority Rule
 - Need to obtain the acceptance of even one impaired class of creditors

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Benefits of Subchapter V

- Individual debtor can modify a mortgage on principal residence, provided the mortgage loan was not used to acquire the real property and was used primarily in connection with the debtor's business
- Administrative claims may be paid over the life of the plan.
- Subchapter V trustee appointed
 - Primary responsibility is to facilitate the development of a consensual plan of reorganization



Plan Requirements

- The Plan
 - Cannot discriminate unfairly
 - Must be “fair and equitable” with respect to impaired unsecured creditors
 - “Fair and equitable” means only that the SBRA debtor must commit all of its “projected disposable income” to make payments under the plan for a minimum of three and a maximum of five years.
 - Must demonstrate a “reasonable likelihood” that the debtor will be able to make all payments
 - Must provide “appropriate remedies, which may include the liquidation of nonexempt assets” to protect creditors if the debtor fails to make plan payments



Timetable

- Status conference within 60 days of the filing
- Status report due 14 days prior to the status conference detailing the efforts to attain a consensual plan of reorganization
- Plan required to be filed 90 days after the order for relief
 - 90-day plan-filing deadline may be extended under “circumstances for which the debtor should not justly be held accountable.”
 - COVID may be considered in extension requests

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Subchapter V Trustee

- Appointed by the US Trustee
- Primary role is to:
 - Provide guidance to debtor in formulating consensual confirmable plan
 - Mediate between debtor and creditors to obtain consensual plan
 - Subchapter V trustee cannot file plan
- Required to appear at 60-day conference, and hearings that concern asset sales, the value of assets subject to liens, plan confirmation, and post-confirmation plan modification
- Other duties may include:
 - objecting to proofs of claim and opposing discharge, if appropriate
 - performing obligations of the debtor (including operating business) if debtor is removed as debtor in possession

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Subchapter V Trustee

- Terminated upon substantial consummation of the plan in consensual plan, unless confirmation order provides otherwise
- Continues as disbursement agent for nonconsensual plan

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Questions

- Is the lack of attorney-client privilege with the Subchapter V an impediment to the successful assistance of the Subchapter V trustee?
- At what point does a Subchapter V trustee change from a “supporter” to a “critic”?
- Subchapter V plans are characterized as consensual or nonconsensual, but Section 1125 does not apply
 - Is balloting required?

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Questions

- Subchapter V plans require that the debtor's projected net income over the plan be used to satisfy claims.
 - What happens if the debtor does much better than projected?
 - Some plans are including increased/accelerated distributions if the debtor does better than projected.
- In nonconsensual plans, Subchapter V trustees serve as the disbursing agent, but no method of compensation for the services has been provided.
 - Is a fee of 3% to 5% of disbursements made by the Subchapter V trustee appropriate?

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Questions

- Rule 3014 provides that an undersecured creditor must make a Section 1111(b) election before the conclusion of the hearing on approval of the disclosure statement.
 - What is the deadline in Subchapter V cases which have no disclosure statement requirements?

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Questions

- As noted above, there are relatively stringent time frames for the administration of a Subchapter V cases
 - Can a Chapter 11 case can be redesignated as a subchapter V case after the deadlines have lapsed.
- Are Debtors being overly generous in designating liabilities as “Unliquidated” to get under the cap on liabilities?
- Plans must provide “appropriate remedies, which may include the liquidation of nonexempt assets” to protect creditors if the debtor fails to make plan payments
 - What are other “Appropriate remedies?

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Faculty

Stephen B. Darr, CPA, CIRA, CFF, CDBV is a managing director in the Boston office of Huron Consulting Group and has more than 35 years of experience providing accounting, auditing and financial consulting services to business organizations experiencing significant financial and operating difficulties. His industry experience includes law and professional services firms, health care, pharmaceuticals, energy, automotive, real estate/construction, mortgages/derivatives, telecommunications, and manufacturing and distribution. Mr. Darr's experience also includes providing litigation support and expert testimony in bankruptcy and nonbankruptcy matters involving proposed plans of reorganization, preference and fraudulent conveyance actions, professional liability claims, patent infringement, royalty and intellectual property disputes, construction claims, wrongful employment discharge, and lender liability and business tort claims. He has testified in court proceedings in Delaware, New York, Pennsylvania, Massachusetts, Rhode Island, Connecticut, Maine, New Hampshire, California and Vermont on a wide range of matters, including feasibility of business plans, valuation, contract disputes, financing arrangements, allowability of creditors' claims, preference and fraudulent conveyance claims, solvency, substantive consolidation and veil-piercing issues, equitable subordination, reorganization tax issues, and key employee retention plans. Mr. Darr is a Fellow of the American College of Bankruptcy and a director of the Association of Insolvency and Restructuring Advisors. He received his B.B.A. from Boston College and his M.B.A. from the University of Chicago.

Robert J. Keach is a shareholder at Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, where he focuses on the representation of various parties in workouts and bankruptcy cases, including debtors, creditors, creditors' committees, lessors and third parties acquiring troubled companies and/or their assets. He served as co-chair of ABI's Commission to Study the Reform of Chapter 11. Mr. Keach has appeared before the bankruptcy courts in the Districts of Maine, Massachusetts, New Hampshire, Delaware, the Northern District of California and the Southern and Eastern Districts of New York. He has appeared as a panelist on national bankruptcy, lender liability and creditors' rights programs, and is the author of several articles on bankruptcy and creditors' rights appearing in the *ABI Law Review*, *Commercial Law Journal* and *ABI Journal*, among other publications. He is admitted to practice in Maine and Massachusetts. Mr. Keach is an adjunct professor teaching cross-border insolvency at Boston College Law School, and he is the estate representative (and formerly the chapter 11 trustee) in the cross-border railroad reorganization of Montreal Maine & Atlantic Railway, Ltd. He is also the fee examiner as to all professionals retained by the Financial Oversight and Management Board for Puerto Rico, and in the cases of *In re AMR Corporation* (the chapter 11 cases of American Airlines and its parent and certain affiliates), *Exide Technologies*, *Mineral Park* and *Relativity Media*. Mr. Keach has, *inter alia*, represented ad hoc committees in the *Homebanc Mortgage*, *New Century TRS Holdings* and *Nortel Networks* cases in Delaware, as well as a public utilities commission in the *FairPoint Communications* case in the Southern District of New York, and parties in *In re Sports Authority Holdings Inc.*, *In re Heritage Home Group*, *In re The Bon-Ton Stores Inc.* and *In re Verso Corp.*, all in Delaware, and *In re Toys "R" Us Inc.* in the Eastern District of Virginia. Mr. Keach represents international private-equity funds in distressed company acquisitions throughout the U.S. He is Board Certified in Business Bankruptcy Law by the American Board of Certification. Mr. Keach received his J.D. in 1980 from the University of Maine.

Stephen G. Morrell is an assistant U.S. Trustee with the Office of the U.S. Trustee for Region 1 in Portland, Maine, which supervises the administration of bankruptcy cases in the federal districts created for Massachusetts, Maine, New Hampshire and Rhode Island. Prior to that, he had been a shareholder with Nixon Peabody for 28 years. Mr. Morrell is Board Certified in Business Bankruptcy Law by the American Board of Certification. He received his B.A. in government and legal studies from Bowdoin College in 1975 and his J.D. in 1978 from the University of Maine Law School.

Hon. Jerrold N. Poslusny, Jr. is a U.S. Bankruptcy Judge for the District of New Jersey in Camden, appointed in June 2015. Prior to his appointment, he clerked for Hon. E. Stephen Derby and Hon. James F. Schneider, U.S. Bankruptcy Judges for the District of Maryland, then worked as an associate and member with the firm of Cozen O'Connor P.C. in Cherry Hill, N.J. He then was a shareholder of Sherman, Silverstein, Kohl, Rose & Podolsky, P.A. in Moorestown, N.J., where he concentrated his practice in bankruptcy law, workouts and commercial litigation. Judge Poslusny is admitted to the state bars and district courts of Delaware, Maryland and New Jersey, and the Third and Fourth Circuit Courts of Appeal. He is a member of the National Conference of Bankruptcy Judges, ABI, the Association of Insolvency and Restructuring Advisors and the Camden County Bar Association. He has served as an editor, author and frequent lecturer to professional and educational organizations. Judge Poslusny received his B.S. from Pennsylvania State University and his J.D. from the University of Maryland School of Law.